Supreme Court, U.S.
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In The
Supreme Court of The United States
October Term 1996

BLYTHEVILLE COMPRESS CO., INC., et al.,
Petitioners,

v.

BANKERS TRUST COMPANY,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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193 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in failing to apply the United States Warehouse Act, 7 U.S.C.A. § 241 et seq., and the Rules and Regulations promulgated thereunder in deciding that the terms of the Petitioners' cotton warehouse tariffs/contracts were not binding upon Respondent, Bankers Trust Company, who owned cotton stored with each of the Petitioner warehouses?

2. Whether the Court of Appeals erred and departed from the accepted and usual course of judicial proceedings in failing to remand this cause to the District Court pursuant to Rule 56 of the Federal Rules of Civil Procedure to decide a genuine issue of a material fact; i.e., whether or not Bankers Trust Company was unjustly enriched by benefitting from Petitioners' warehouse services without having to pay warehouse charges?

PARTIES TO THE PROCEEDING

Blytheville Compress Co., Inc.; Central States Cotton Co.; D. B. Griffin Warehouse, Inc.; Deer Creek Compress Company, d/b/a Rolling Fork Compress and Warehouse; Dunavant Enterprises, Inc.; Franklin Cotton Warehouse Cooperative, Inc.; FST, Inc., d/b/a National Compress Warehouse; Greenville Compress Company; Harlingen Compress Company, Inc.; Holmes Gin, Inc., d/b/a Holmes Bonded Warehouse; Levelland Compress Co., Inc.; National Diversified Co., d/b/a Ballinger Compress Co., Hamlin Compress Co., Rule Compress Co., and San Angelo Cotton Warehouse Co.; North Plains Compress; Pate Grain Company, d/b/a Postex Warehouse Company; Port of Corpus Christi Authority of Nueces County, Texas Dockside Warehouse and Cotton Compress, d/b/a Corpus Christi Public Compress; Rayville Compress & Warehouse Cooperative, d/b/a Tallulah Compress & Warehouse and Rayville Compress Warehouse; Southern Compress Company; Southern Compress & Warehouse Company; Staple Cotton Cooperative Association, d/b/a Staplcotn Compress Warehouse; Sunflower Compress Company; Sweden Warehouse Company, Inc.; Sweet Jet Oil Co. Trust, Trustee Jack Poe, d/b/a Tri-County Warehouse Company; Sweetwater Compress, Inc.; Tensas Warehouse, Inc.;

Texas Compress & Warehouse Corporation, d/b/a Stamford Compress & Bonded Warehouse, Seymour Compress & Bonded Warehouse, Colorado Compress & Bonded Warehouse and Haskell Co. Warehouse & Compress Co.; The Trinity Company; Tunica Compress & Warehouse Company; Valley Compress Company, Inc.; Union Service Industries, Inc., d/b/a Union Compress Warehouse of Alabama, Union Compress Warehouse of Louisiana at Winnsboro, and Union Compress Warehouse of Louisiana at Ferriday; and West Texas Industries, Inc., (hereinafter referred to as "Warehouses") are cotton warehouses located in the states of Mississippi, Arkansas, Louisiana, Tennessee and Texas.

Bankers Trust Company, a member of Bankers Trust of New York Corporation, a corporation, (hereinafter referred to as "Bankers Trust") is a banking corporation domiciled in New York City, New York.

Dunavant Enterprises, Inc. is the majority stockholder of Dunavant Holding, Inc. which is the majority stockholder of Central States Cotton Co. and Southern Compress & Warehouse Company. Levelland Compress Co., Inc. is wholly owned by Presstok, Inc., a Texas corporation. There are no parent or non-wholly owned subsidiary companies of the other Petitioners.

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Petitioner, Blytheville Compress Company, Inc., et al, petitions as follows for a Writ of Certiorari to review the July 17, 1996, opinion of the United States Court of Appeals for the Sixth Circuit which affirms the order entered by the United States District Court for the Western District of Tennessee on March 29, 1994, and the subsequent judgment entered April 7, 1994.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Tennessee, entered on March 29, 1994 is unreported, and the opinion of the United States Court of Appeals for the Sixth Circuit entered on July 17, 1996, is reported at 89 F. 3d 292 (6th Cir. 1996).

JURISDICTION

This Petition seeks review of an opinion entered by the United States Court of Appeals for the Sixth Circuit on July 17, 1996. A Petition for Rehearing and Suggestion for Rehearing En Banc filed by petitioners, Blytheville Compress Company, Inc., et al, was denied

by the United States Court of Appeals for the Sixth Circuit on August 29, 1996.

Petitioners seek to invoke the jurisdiction of the Court to review the opinion of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C.A. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This appeal involves the United States Warehouse Act, 7 U.S.C.A. § 241 et seq. and rules and regulations promulgated by the Secretary of the United States Department of Agriculture.

STATEMENT OF THE CASE

Petitioner Warehousemen's claim for approximately 1.2 million dollars in accrued storage charges arose from the handling, storage, delivery and other services performed by them for Bankers Trust Company the owner/holder/bearer of warehouse receipts. These services provided for the storage and protection of thousands of bales of cotton represented by negotiable warehouse receipts. The cotton was stored by the warehouses pursuant to the terms of the warehouses' filed and published tariff,

most of which provided that the party surrendering the negotiable warehouse receipt shall be liable for all accrued charges pertaining to that bale. Other tariffs provided that the shipper shall be liable for all accrued charges.

Each warehouse filed and published its United States Department of Agriculture approved tariff setting its rates, rules and regulations. Bankers Trust was the owner/holder/bearer of the negotiable cotton warehouse receipt surrendered by its agent L&S Cotton Systems. Bankers Trust had the legal right to surrender the warehouse receipts and demand delivery and did so. However, Bankers Trust has steadfastly refused to pay the warehouse Petitioners for accrued storage charges relating to the stored cotton.

- The above facts are uncontradicted as can be seen from the opinion of the United States District Court as well as the opinion of the Sixth Circuit Court of Appeals. However, both courts have simply neglected and/or refused to enforce the terms of the tariff providing that the party surrendering the receipt or the shipper are liable for all storage charges.

The basis of federal jurisdiction rested in diversity of citizenship pursuant to 28 U.S.C.A. § 1446(b). Furthermore, a federal question existed concerning the interpretation and enforcement of the United States Warehouse Act, 7 U.S.C.A. § 241 et seq.

ARGUMENT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW AS TO WHETHER A WAREHOUSEMAN'S TARIFF IS A BINDING CONTRACT BETWEEN THE WAREHOUSE AND THE HOLDER/OWNER/BEARER OF A NEGOTIABLE COTTON WAREHOUSE RECEIPT PURSUANT TO THE UNITED STATES WAREHOUSE ACT, THE RULES AND REGULATIONS PROMULGATED THEREUNDER BY THE SECRETARY OF AGRICULTURE AND THE JUDICIAL DECISIONS OF THE UNITED STATES SUPREME COURT.

The United States Supreme Court has consistently decided in its judicial opinions that a filed and published tariff such as those in this case has the enforceability of law. However, both the District Court and the Court of Appeals have refused or neglected to recognize the enforceability of the warehouse tariffs.

Congress, through its enactment of 7 U.S.C.A. § 268, provided, "The Secretary of Agriculture shall from time to time make such rules and regulations as he may deem necessary for the efficient execution of the provisions of this chapter." (Emphasis added.)

Pursuant to this statutory mandate, the USDA promulgated rules and regulations for the operation of cotton warehouses. 7 C.F.R. § 735.29 promulgated by the Secretary of Agriculture discusses the rules and schedule of charges:

> . . . the Warehousemen shall file with the department a copy of his rules, if any, and a schedule of the charges to be made by him . . . At or before the beginning of each season every licensed warehouseman shall file with the Department a copy of his rules, if any, and of his schedule of charges for the ensuing season. . . . Each licensed warehouseman shall keep a copy of his current rules and schedule of charges exposed conspicuously in the place prescribed by §

> 735.6 and at such other place accessible to the public as the Secretary or his designated representative may from time to time designate . . . (Emphasis added.)

It is undisputed, by each warehouse's affidavit, (See Affidavit of Woods E. Eastland in App. @ p. 137.) that it did present it rates, rules and regulations to the USDA for its approval, that each of the tariffs was approved, and each of the tariffs was posted pursuant to 7 C.F.R. § 735.29 of the Rules and Regulations of the USDA. Neither the Warehouse Act nor its rules and regulations requires that the warehouseman mail its tariff to BTCo or anyone else. The reason is simple: the warehouseman has no earthly idea who the ultimate owner\holder\bearer of its negotiable warehouse receipt will be. The majority opinion at pages 3 and 5 has misplaced the significance of the warehouseman not mailing its filed and published tariff to BTCo and obviously misapplied the law hereinafter cited. Once again, mailing tariffs to unknown owners of warehouse receipts is not required by the Act. The United States Supreme Court decisions, defining the

legality of tariffs, developed in the early part of this century in cases evolving from the Interstate Commerce Act. The United States Warehouse Act has not garnered significant judicial attention; but, the rates, rules and regulations, which are components of the Interstate Commerce Act, have been interpreted extensively. These cases are instructive to the case at bar and controlling.

Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 284, 66 L. Ed. 943 (1922) at p. 946, describes the purpose of the Interstate Commerce Act: "It is true that uniformity is the paramount purpose of the Commerce Act". This is identical to the purpose of the United States Warehouse Act. See, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 91 L. Ed. 1447 (1947), at p. 1462 and Federal Compress and Warehouse Company v. McLean, 291 U. S. 17, 54 S. Ct. 267, 78 L. Ed. 622 (1934), at p. 627.

The Interstate Commerce Act specifically requires (1) that a carrier adopt reasonable rates and practices, (2) that the rates be non-discriminatory, and (3) the tariffs be published and filed with the Interstate Commerce Commission.

The Warehouse Act contains analogous provisions.

Maslin Industries v. Primary Steel, 497 U.S. 116, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990) at p. 126 described the rights between the parties as follows:

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, the rate is made for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier . . . This stringent rule prevails, because otherwise the paramount purpose of Congress . . prevention of unjust discrimination . . might be defeated. (Emphasis added.) (Internal citations omitted.)

Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 83 L. Ed. 953 (1939) at p. 956, stands for the same proposition that the tariff is the only

binding contract between the parties and analogizes the responsibility of BTCo for payment of the charges. It states:

> These are the essential provisions of the tariff. . the dominant elements are the responsibility for and the amount of the charge. These are fixed by the tariff . . . until changed, tariffs bind both carriers and shippers with the force of law. (Emphasis added.)

Similarly, in Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 163, 67 L. Ed. 183, 43 S. Ct. 47 (1922) the Supreme Court wrote: "The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper." (Emphasis added.)

The facts in Lowden, supra p. 5, involved a tariff rule which required the shipper to pay for certain boxcar doors, to which the shipper objected. The court however found that the shipper was bound by the terms of the filed and published

tariff of the carrier. The facts of the case sub judice involve a rule which required the party which surrendered or shipped the warehouse receipt to be liable for all accrued charges. There is no distinction.

The majority opinion finding that the warehouses' USDA approved, filed and published tariff is not a binding contract between the warehouse and the owner (BTCo) of the warehouse receipt is in direct conflict with the Sixth Circuit's decision of Norfolk and Western Railway Co. v. American Compressed Steel Co., 181 F. 2d 183 (6th Cir. 1950) at p. 184:

> In effect, the district court changed the tariff provisions and the freight charges calculated thereon, and entered a judgment based on its own calculations as to what would be equitable between the parties. We think the court possessed no such power. Deviation from rates fixed by schedules duly filed is not permitted, even though hardship may result occasionally from the undeniably strict rule.

Louisville and Nashville R.R. v. Maxwell, 237 U.S. 94, 35 S. Ct. 494, 59 L. Ed. 853, L.R.A.

1915 E, 665. See also, Pennsylvania Railroad Company v. International Coal Mining Company, 230 U.S. 184, 196, 33 S. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915, 315.

In Texas and Pacific Railway Company v. Abilene Cotton Oil Company, 204 U.S. 426, 427 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, the state trial judge followed very much the same procedure as did the United States District Judge in the instant case. The Supreme Court of the United States reversed, holding that the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq. had placed upon carriers the duty of publishing schedules of reasonable and uniform rates, and therefore a shipper could not maintain an action for excessive and unreasonable freight charges exacted on interstate shipments where the

> rates charged were those which had been duly fixed according to the Act and had not been found unreasonable by the Interstate Commerce Commission.

The above case is analogous to the case sub judice. The Warehousemen's tariff was approved by the USDA according to the United States Warehouse Act and the rules and regulations thereunder, the tariff was filed at the USDA and the tariff was published according to the requirements of the USDA. The rules of the tariff have not been found unreasonable by the United States Department of Agriculture. The rule that the party or shipper which surrenders the warehouse receipts shall be responsible for the accrued charges is clearly written within the tariff and must be enforced according to its terms regardless of any equities or inequities which may effect the parties. However, as shown by the dissenting opinion of the Sixty Circuit, the equities are clearly in favor of the Warehousemen and would be a question of fact for the jury.

Other jurisdictions are supportive in these holdings that the terms of a filed and published tariff are legally

binding. Western Transportation Company v. E.I. Du Pont De Nemours & Company, 682 F. 2d 1233 (7th Cir. 1980) at p. 1235, states, "If a tariff is unambiguous it must be enforced according to its terms, regardless of the equities . . ." The Warehousemen's tariffs are crystal clear. Pennsylvania Railroad Co. v. Moore-McCormack Lines, 370 F. 2d 430 (2nd Cir. 1966) at pp. 432 and 433, states, "A court, however, has no power to alter the terms of a duly published and filed tariff in order to make the terms reasonable." The Warehousemen's tariffs are certainly reasonable. That's not an issue.

Finally, the Supreme Court recently reaffirmed the overriding nature of the tariff in relationships between shippers and carriers in Square D v. Niagara Frontier Tariff Bureau, Inc., 106 S. Ct. 1922, 90 L. Ed. 2d 413 (1986).

Maslin Industries v. Primary Steel, 497 U.S. 116, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990) stands for the proposition that BTCo cannot claim ignorance:

> As the court has frequently stated, the statute does not permit either a shipper's

> ignorance or the carrier's misquotation of the applicable rate to serve as a defense to the collection of the filed rate. (Citations omitted) at p. 104 . . . Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, . . . (Emphasis added.) (Citations omitted.) Fn 2 at page 117.

Also, Paulson v. Greyhound Lines, Inc., 804 F. 2d 506 (8th Cir. 1986), at p. 507 stated, "Both the shipper and carrier are presumably aware of the tariff and its provisions." In making this statement, Paulson cites the United States Supreme Court as authority, Pittsburgh, Cincinnati, Chicago & St. Louis. Ry. v. Fink, 250 U.S. 577, 581, 40 S. Ct. 27, 28, 63 L. Ed. 1151 (1919). The Tennessee District Court in Orr v. Interstate Commission, 703 F. Supp. 676 (W. D. Tenn. 1988) Fn 3 at page 680 has

ruled that constructive notice is the standard:

> We did not eradicate the doctrine that the rate is filed as a matter of public record and the shipper is charged with constructive notice of the actually filed rate.

This is absolutely on point with the facts in this case. The United States Supreme Court first found in 1914 that constructive notice is sufficient to bind the parties to the terms of a filed and published tariff and ignorance is no excuse whatsoever. The court in Chicago & Alton R.R. Co. v. Kirby, 225 U.S. 155, 56 L. Ed. 1033 (1914) at p. 1038, stated:

> That the defendant in error did not see and did not know that the published rates and schedules made no provision for the service he contracted for is no defense. For the purposes of the present question, he is presumed to have known. The rates were published and accessible, and, however difficult to understand, he must be taken to

> have contracted for and advantage not open to others. [sic] (Emphasis added.) (Citations omitted.)

The United States Supreme Court in Maslin Industries, supra, p. 8 revisited Maxwell, supra, p. 10 on the issue of constructive notice:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travellers are charged with notice of it, and they as well as the carrier must abide by it, *unless it is found by the Commission to be unreasonable*. Maslin Fn at page 117.

The majority opinion finding that the Warehousemen must mail their tariff to BTCo is mistaken. The approval of the tariff by USDA, the filing of the tariff with the USDA and the publishing of the tariff by posting same according to the USDA meets the United States Supreme Court's requirement of constructive notice. BTCo had notice of the tariff.

This is analogous to a bank filing its deed of trust or UCC financing statement which provides constructive notice of its lien. Remember, it is impossible for a warehouse to know who the ultimate owner/holder/bearer of a bale of cotton will be.

The majority's reliance upon the Uniform Commercial Code is mistaken. The United States Warehouse Act preempts the UCC and all other state law. This is discussed in detail in Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 91 L. Ed. 1447 (1947) at p. 1461 which clearly stands for the proposition that the Warehouse Act preempts state law. It explains that these warehouses can do business "without regard to state acts; that the matters regulated by the federal act cannot be regulated by the states; . . . ".

The majority opinion at page 9 has once again mistakenly applied a doctrine of intentional assumption of duties and liabilities to the facts of this tariff case. This is in direct conflict with the U. S. Supreme Court's and the Sixth Circuit's holdings that all parties are bound by the filed and published tariff. The undisputed facts as determined by the

Sixth Circuit and the cited law reflect that BTCo, as the owner/holder/bearer of the negotiable warehouse receipts, had notice of the Warehousemen's tariff and upon taking possession of the warehouse receipts and assuming ownership, it automatically became bound by the terms of the published tariff. It did so by constructive notice of the tariff and by actual notice provided on the face of the negotiable warehouse receipt. The United States Warehouse Act, 7 U.S.C.A. § 260(h) provides that each warehouse receipt shall contain "a statement that the receipt is issued subject to this chapter and the rules and regulation prescribed thereunder". Each of the subject warehouse receipts had language to the effect that the receipt is issued "SUBJECT TO THE UNITED STATES WAREHOUSE ACT, THE REGULATIONS THEREUNDER FOR COTTON WAREHOUSEMAN, AND THE WRITTEN AND PRINTED TERMS OF THIS CONTRACT." (Emphasis added.) (See Sample Warehouse Receipt attached to Staple Cotton's affidavit). It is clearly understood within the cotton industry, and also common sense, that a negotiable cotton warehouse receipt will change hands many times during the course of a cotton season and that the identity of each subsequent holder is obviously unknown to

the warehouse until it is surrendered for delivery of the bale of cotton. It is ludicrous to even imagine that a subsequent owner of cotton would not be responsible for the storage charges of cotton by a warehouseman which storage inures to the benefit of the owner/ holder/bearer. This is nonsensical.

Once again, the Sixth Circuit majority opinion is mistaken in its statement at page 9 of its opinion, "Indeed, there is no indication in the record that Bankers Trust ever intended to assume The Julien Company's duty to pay the cotton storage charges." The majority has overlooked the fact that it and the District Court found BTCo to be the owner/holder/bearer of the warehouse receipts. BTCo's "intention" is irrelevant. According to the United States Supreme Court, it is bound by the terms of the tariff. The tariff states that the shipper or party surrendering the receipts shall be held liable for all accrued charges. This is not ambiguous. BTCo had constructive and actual notice by the warehouse receipt of same. It is uncontradicted that BTCo was in fact aware of outstanding storage charges on each warehouse receipt at issue.

Again, the majority is mistaken in its statement at page 9 that "there has been no showing of either an express agreement on Bankers Trust's part or an implied contract based on L & S Cotton System surrendering the receipts to the warehouse." As has been clearly shown in this brief and previous ones, the United States Supreme Court has consistently ruled that filed and published tariffs which have been approved by a government agency are binding on the parties. The fact that the warehouse waived a statutory lien is totally immaterial. To illustrate how devastating this opinion would be upon the commercial business community, one must consider what the consequences would be if an auto repair shop waived its mechanic's lien, released its automobile on credit to the owner, and then was advised by this Court that it could not collect its repair charges because it returned the automobile to the owner and waived its mechanic's lien. That is the situation in this case. Another example of this ruling's effect: What if a contractor releases his materialman's lien for materials delivered to a house and then was advised by this Court that his bill was uncollectible by law because he waived his lien?

In the instant case as quoted on page 20 of the dissent, "the documents [warehouse receipts showing ownership in the bank, bills of lading, and shipping instructions] were at all times to be held and handled by you in trust for our account." This is certainly an indication that the bank/owner/bearer intended to pay for the services of the warehouse that it was requesting.

It is of utmost importance and crucial to the cotton industry that this Court enforce the terms of the warehouse tariff in order to lend uniformity to and establish the legal rights between warehouses and their customers.

II.

IF PETITIONERS ARE NOT ENTITLED TO JUDGMENT ON THE BASIS OF THE TARIFF, THEN THIS COURT SHOULD EXERCISE ITS DISCRETION AND REMAND FOR A TRIAL ON THE FACTUAL ISSUE OF UNJUST ENRICHMENT/RESTITUTION.

This Court should grant certiorari pursuant to Rule 10(a) of the Rules of the Supreme Court in that the Sixth Circuit has totally deviated from the accepted and usual course of judicial proceedings concerning summary judgments.

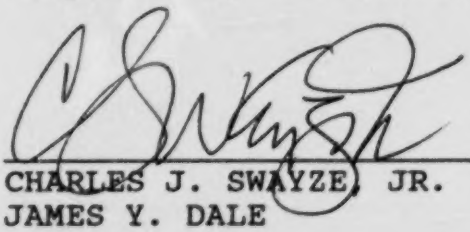
As can easily be seen by the dissent of Chief Judge Merritt there existed a genuine issue as to material fact relating to the theory of unjust enrichment whereby Bankers Trust Company received substantial and great benefits (in excess of $1,200,000.00 worth) from petitioners at no cost and yet recovered 100% of the value of the cotton stored by petitioners. No court should grant summary judgment when genuine issues of material fact exist. Thus, the Sixth Circuit has so departed from the accepted and usual course of judicial proceedings relating to summary judgments as to call for the exercise of this Court's supervisory power and order a trial on the merits. In the case sub judice it is uncontradicted that the warehouses stored cotton which, under the majority opinion, was owned by Bankers Trust Company. Upon surrender of the warehouse receipt and the request of Bankers Trust Company by and through its agent L&S Cotton Systems, Inc., the warehouses shipped and delivered the subject cotton without receiving payment in advance. All funds derived from the sale of the subject cotton to the mills were deposited in Bankers Trust accounts. Although Bankers Trust never expected to receive 100% of the value of the subject cotton it has

been allowed to do so and is thereby clearly unjustly enriched. Petitioners are entitled to restitution by Bankers Trust Company in the amount of their claim.

CONCLUSION

For the foregoing reasons, Petitioners Blytheville Compress Co., Inc. et al request that this Court grant certiorari in the above captioned matter.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0216P (6th Cir.)
File Name: 96a0216p.06

Nº. 94-5582

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BLUEBONNET WAREHOUSE COOPERATIVE; FEDERAL COMPRESS & WAREHOUSE COMPANY, INC.,
Plaintiffs,

BLYTHEVILLE COMPRESS COMPANY, INC., et al.,
Plaintiffs-Appellants,

v.

BANKERS TRUST COMPANY,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Western District of Tennessee

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Decided and Filed July 17, 1996

Before: MERRITT, Chief Judge;
MARTIN, Circuit Judge;
SIMPSON, Chief District Judge.*

MARTIN, J., delivered the opinion of the court, in which SIMPSON, D. J., joined. MERRITT, C. J. (pp. 11-23), delivered a separate dissenting opinion.

BOYCE F. MARTIN, JR., Circuit Judge. Blytheville Compress Co., Inc., and several other cotton warehouses appeal from a grant of summary judgment to Bankers Trust Company in their suit seeking payment of accrued storage charges for cotton. The warehouses are unsecured creditors of a now-bankrupt cotton merchant, the Julien Company. In their suit, they sought to enforce an express or implied contract between themselves and Bankers Trust, one of the Julien Company's secured lenders. The district court dismissed the action, finding that (1) no express or implied contract existed between the warehouses and Bankers Trust, and (2) a lender holding a perfected security interest in its

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*The Honorable Charles R. Simpson, III, Chief United States District Judge for the Western District of Kentucky, sitting by designation.

borrower's negotiable warehouse receipts does not become liable for its borrower's debts when acting to maintain and protect its security interest. We agree and therefore AFFIRM.

I.

Before discussing the particulars of this case, some background information about the cotton industry in general is helpful. After cotton is harvested, it is ginned and compressed into 500 pound bales before being stored in warehouses to await further transactions. Typically, when it is delivered, the warehouse issues a negotiable warehouse receipt for the cotton. These are issued to whoever deposits the cotton. Warehouses also publish "tariffs" containing a statement of their charges for storage and other such services. Generally, these are not sent to banks who lend to the cotton merchants. By statute, a warehouse storing cotton has a possessory lien against that cotton for its storage charges.

Cotton merchants, such as the Julien Company, acquire ownership of cotton by purchasing the negotiable warehouse receipts. The cotton merchant is then entitled to present the receipt to the warehouse and to take possession or ship the cotton upon satisfaction of the warehouse's statutory possessory lien. Most cotton merchants require bank financing in order to operate.[1] In exchange for this financing, lenders usually

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[1]"In some situations, up to 90% of the cost of the raw cotton may be financed by borrowing against futures contracts and

require that the merchant's warehouse receipts be pledged and physically delivered to them. When the lender takes physical possession of the receipts, it becomes the "collateral custodian." In some cases, the lender will designate a third-party to act as its agent, a collateral sub-custodian.

II.

All of the states adopted the Uniform Warehouse Receipts Act shortly after it was promulgated. As with many of the uniform acts, however, by the late 1930s it was already outdated. Thus, in the 1940s, the National Conference of Commissioners on Uniform State Laws began drafting the Uniform Commercial Code to replace those laws enacted decades earlier. In doing so, over 1500 attorneys spent more than fifteen years piecing the U.C.C. together. No other piece of legislation or code provision ever received such scrutiny and consideration. Adopted by forty-nine states within ten years of disseminating its first draft,[2] the U.C.C. has been hailed as "the most spectacular

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ware-house receipts as collateral. . . ."*Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 20, 27 n.11 (1974).

[2]The Uniform Commercial Code is law in each of the five states where the warehouses involved are located. Ark. Code Ann. § 4-7-209; La. Rev. Stat. Ann. § 10:7-209; Miss. Code Ann. § 75-7-209; Tenn. Code Ann. § 47-7-209; Tex. Bus. &

success story in the history of American law." WHITE AND SUMMERS, UNIFORM COMMERCIAL CODE § 1 (Vol. 1 at 5) (3d ed. 1988). Unfortunately, in practice, Article Seven of the Code, dealing with documents of title and warehouse receipts specifically, was not successfully followed in this case.

Under the Uniform Commercial Code, a warehouse has a possessory lien against the goods covered by a warehouse receipt for storage charges. U.C.C. § 7-209(1). Against a person to whom a negotiable warehouse receipt is duly negotiated, the warehouseman's lien is limited to reasonable storage charges where none are specified on the receipt. *Id.* The Code provides that a person claiming cotton covered by a warehouse receipt must satisfy the warehouseman's lien when the warehouse so requests. U.C.C. § 7-403(2). Further, both the Code and federal Warehouse Act provide that a warehouse is not required to release a bail of cotton until applicable warehousing charges relating to that bale have been paid. U.C.C. § 7-209(1); 7 U.S.C. § 260(j); 7 C.F.R. § 735.29. However, the warehouse's lien is possessory; once the cotton is

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Com. Code Ann. § 7.209. For that reason, reference in this opinion will be to the U.C.C., rather than to each state's statute.

released, the warehouse loses its lien.[3] "A warehouseman loses his lien on any goods which he voluntarily delivers." U.C.C. § 7-209(4). Admittedly, this is precisely what happened here.

III.

The Julien Company *was* one of the world's largest cotton merchants, buying and selling around two million bales each year. The Julien Company stored its cotton in several warehouses, including the ones before this Court. Bankers Trust, among others, financed Julien Company's cotton merchandising business; it served as collateral custodian for all of Julien Compnay's warehouse receipts. In turn, L&S Cotton Systems, Inc., served as Bankers Trust's collateral sub-custodian. In order to perfect its security interest in the Julien Company's warehouse receipts, Bankers Trust, through its agent L&S Cotton Systems, took possession of the receipts. U.C.C. § 9-305. Bankers Trust insists that by so doing, it could exercise dominion and control over the receipts, but did not become

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[3] "[T]he specific lien arises only with respect to goods in the 'possession' of the warehouseman. If the warehouseman voluntarily delivers the goods on a promise to pay charges and the erstwhile bailor thereafter defaults, the warehouseman cannot then demand the goods and reassert his lien." White and Summers, § 21-6 (Vol. 2 at 181).

the owner of the receipts or the underlying cotton. Bankers Trust asserts that it is not itself a cotton merchant, was not a customer of the warehouses, and never directly paid any of the warehouses for Julien Company's storage charges.

Each warehouse involved in this case stored the Julien Company's cotton and issued negotiable warehouse receipts representing the individual bales of cotton stored. Most of these receipts contain language stating that "[u]pon surrender of this receipt and the payment of all liens due the warehouseman, said cotton will be delivered to the bearer." Most of them also mention the tariffs as specifying charges. Many of the tariffs, in turn, state that whoever surrenders the receipts will be liable for the storage charges. But, none of the warehouses sent its tariffs to Bankers Trust or its collateral sub-custodian, L&S Cotton Systems. Each warehouse did, however, release and ship the Julien Company's cotton, upon the Julien Company's request and direction, without first being paid by the Julien Company for the accrued storage charges. Because Bankers Trust had possession of the receipts, the Julien Company sent a tag list identifying the cotton and shipping documents to L&S Cotton Systems, who forwarded these along with the receipts to the warehouses. Despite having the legal right to refuse to ship the cotton until their storage charges were paid, the warehouses

waived their lien rights by releasing the cotton and invoicing the Julien Company for the charges.

In January 1990, Bankers Trust and two other creditors had the Julien Company placed involuntarily in bankruptcy. At the time, the warehouses had unpaid invoices from the Julien Company dating back six months and totaling over one million dollars; none ever contacted Bankers Trust or L&S Cotton Systems to request payment. Twenty-one of the warehouses involved here were also plaintiffs in adversary proceedings filed in the Julien Company's bankruptcy. They sought to establish a general lien against cotton still in their possession for payment of the same storage charges at issue here; They claimed that the Julien Company owned the cotton, contracted for its storage, and consequently owed the accrued charges. The warehouses' claims were unsuccessful in the bankruptcy proceedings. *Sunflower Compress v. Julien Co.*, 136 B.R. 784 (Bankr. W.D. Tenn. 1992); *Bluebonnet Warehouse Corp. v. Julien Co.*, 136 B.R. 765 (Bankr. W.D. Tenn. 1992).

On May 24, 1991, while the bankruptcy proceedings were still pending, the warehouses initiated this action in the district court claiming that Bankers Trust owed the storage charges. The warehouses argued that because Bankers Trust surrendered the warehouse receipts for shipment of the cotton, it owed the storage charges

under a theory of either express or implied contract. In ruling on cross-motions for summary judgment, the district court disagreed. Bankers Trust never expressly agreed to pay the storage charges. The court also found that, based on the undisputed facts, there was insufficient evidence from which a jury could conclude that Bankers Trust implicitly agreed or promised to pay the storage charges upon shipment of the cotton if the warehouses failed to exercise on their liens. The court granted summary judgment in favor of Bankers Trust, from which the warehouses now appeal. In doing so, they seek to circumvent both the specific lien provisions of the U.C.C. and the bankruptcy proceedings.

Before this Court, the warehouses maintain that express or implied contracts exist for the payment of storage charges by virtue of Bankers Trust surrendering the warehouse receipts. They assert that the bases and terms of these contracts are found in the language of the warehouse receipts and the tariffs. Bankers Trust, in turn, contends that if a warehouse waives its lien and does not collect its charges before releasing the cotton, electing instead to invoice the cotton merchant, the warehouse has simply chosen to become an unsecured creditor of the cotton merchant. Bankers Trust insists that it is not the owner of the cotton and no contract exists for the warehouses' storage charges.

IV.

To begin, Bankers Trust did become the owner of both the warehouse receipts and the underlying cotton when it took possession of the receipts to perfect its security interest. All of the warehouse receipts purchased by the Julien Company were made to "bearer." As such, they were all negotiable bearer documents of title, U.C.C. § 7-104(1)(a), and were negotiated by delivery alone. U.C.C. § 7-501(2)(a). Delivery means simply the "voluntary transfer of possession." U.C.C. § 1-201(14). Further, as documents of title, if Bankers Trust is a holder[4] to whom the warehouse receipts were "duly negotiated," it acquired both title to the documents and title to the goods. U.C.C. § 7-502(1). A negotiable warehouse receipt is duly negotiated when it is negotiated to a holder who purchases it in good faith, without notice, and for value. U.C.C. § 7-501(4). There is no allegation that Bankers Trust took possession of the receipts without good faith or with notice. Bankers Trust's pre-existing claim constitutes value;

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[4]Bankers Trust does not dispute whether it is a holder of the warehouse receipts. Indeed, it cites cases for the proposition that a person who becomes a holder of warehouse receipts as collateral security does not become bound for storage charges by reason of having possession of the receipt. *Millichamp v. First National Bank*, 226 P. 490 (1924); *Driggs v. Dean*, 60 N.E. 336, 338 (N.Y. 1901).

possessing the receipts as security for previously extended credit is also in the regular course of financing. U.C.C. §§ 1-201(44), 7-501 n.1. Thus, the receipts were duly negotiated.

Because the warehouse receipts were bearer documents, Bankers Trust owned the cotton when it took possession of them. As the title-holder, Bankers Trust was subject to the warehouseman's lien. Although to do so may have breached its agreement with the Julien Company, Bankers Trust had the legal right to surrender the receipts to the warehouses at any time and demand the cotton. The warehouses argue that Bankers Trust became contractually obligated to pay the storage charges when its agent surrendered the warehouse receipts at the Julien Company's direction.

The question then becomes whether the warehouse receipts and tariffs may also establish a contract between the warehouses and Bankers Trust. The U.C.C. provides that, unless displaced by a specific provision, principles of law and equity shall supplement the Code. U.C.C. § 1-103. Further, the Code provides that a warehouse may insert any terms not contrary to the Code in a receipt. U.C.C. § 7-202(3). Where bailors and third parties owe storage charges, "the warehouseman has ordinary contract rights to payment enforceable in the courts by action. Under 7-209 and 7-210, such contract rights to payment

may be secured by a specific lien...Of course, if for some reason the warehouseman's lien...is lost or is ineffective, the warehouseman may still assert his contract rights." White and Summers, § 21-6 (Vol. 2 at 179-180). Thus, the warehouse receipt may constitute a contract separate and apart from the warehouseman's lien. Loss of the lien, therefore, does not necessarily mean that a warehouse loses the right to compensation for services rendered. *Jimani Corp. v. S.L.T. Warehouse Co.*, 34 U.C.C. Rep. Serv. 175, 181, 409 So.2d 496, 501 (Fla. App. 1982); HAWKLAND, HOLLAND & ANZIVINO, UNIFORM COMMERCIAL CODE SERIES, § 7-209:05 (Vol. 7 at 144). Therefore, if a separate contract for payment exists, it may still be enforced despite waiving the lien.

The fact that a contract may exist based on the terms of the warehouse receipts and tariffs does not end our inquiry. Were a contract to exist, for a subsequent holder of the warehouse receipt to become bound by its terms, he must assume the duties and liabilities of that contract. When a contract is assigned, there is a presumption that all rights under the contract are assigned and duties delegated. Restatement (Second) of Contracts § 328(1). This presumption holds true, "[u]nless the language or the circumstances indicate the contrary, *as in an assignment for security*." *Id.* (emphasis added). An assignment as security, such as was done here when the Julien Company pledged its warehouse receipts to Bankers

Trust as collateral, "does not ordinarily delegate performance to the secured party, and the secured party does not assume the assignor's duties." *Id.* comment b; *Newton v. Merchants & Farmers Bank of Dumas*, 668 S.W.2d 51, 53 (Ark. App. 1984). Indeed, there is no indication in the record that Bankers Trust ever intended to assume the Julien Company's duty to pay the cotton storage charges. The very purpose of the assignment--to perfect a security interest--goes against such a presumption. *Poindexter v. National Mortgage Co.*, 1995 WL 242287, *11 (N.D. Ill. April 24, 1995).

Although a warehouseman does not forfeit contractual obligations by waiving a specific lien, we do not find that Bankers Trust has any contractual obligation to pay the storage charges for the Julien Company's cotton; there has been no showing of either an express agreement on Bankers Trust's part or an implied contract based on L&S Cotton Systems surrendering the receipts to the warehouse. As the district court found, "no promise to pay the storage charges can be implied from the simple exercise by [Bankers Trust] of its lawful right to surrender the receipts and to compel the release of the cotton underlying the warehouse receipts subject to payment of the liens, if requested." No such request was made. The warehouses released the cotton, waived their specific lien, and now seek to create a contract where none was intended to recoup their lost storage charges. The Uniform

Commercial Code intended that warehouses retain possession of stored goods until the warehouses' lien is satisfied and gives them the legal right to do so. Unfortunately, the warehouses in this case did not enforce their liens. Moreover, they did not even release the cotton on condition of payment by a third party, Bankers Trust, but simply invoiced the cotton merchant. Bankers Trust is therefore not legally obligated to pay the warehouses storage charges.

Judgment AFFIRMED.

MERRITT, Chief Judge, dissenting. The Court has concluded that Bankers Trust is not liable to the warehouses for storage charges under any contract theory. Even if this were correct, and I have my reservations as to that proposition, the Court has failed to consider the argument of the warehouses that the summary judgment papers establish a valid common law claim in restitution for unjust enrichment of Bankers Trust at their expense. This claim, referred to below as a claim for breach of "implied contract," was hazy and ill-formed at the trial level. The court below failed to mention or deal with it in its opinion. In its original appellate brief the warehouses at page 28 referred briefly to it as a claim that Bankers Trust "benefitted unjustly from these actions and in fact has been unjustly enriched by its own wrongful actions." At oral

argument the Court recognized that the warehouses were trying, however unartfully, to describe a claim in restitution and asked that the parties file supplemental briefs of this theory of liability. The parties, including two amici representing large banking institutions, have now filed supplemental briefs on this point. Because I believe that the court below should be reversed, and that this case should be tried under a theory of restitution, I respectfully dissent.

Equitable Remedies and the U.C.C.

If in a case such as this, as the majority has concluded, an express contract does not exist, a court should follow common law doctrines of restitution, sometimes referred to as "implied contract," "quasi-contract," "quantum meruit," or "unjust enrichment," to insure in certain circumstances that a party who has conferred a benefit on another is allowed to recoup its costs. These common principles of restitution, by whatever name, are now well accepted in the law, as Dean John W. Wade elaborated in a seminal article collecting cases thirty years ago:

> The principle is now fully recognized in this country that a "person who has been unjustly enriched at the expense of another is required to make restitution to the other." This is the language

> of the first section of the *Restatement of Restitution*. When one person confers a benefit upon another without the latter's solicitation, the benefit received constitutes an enrichment--a windfall, so to speak. This benefit may take one of several forms. It may involve (1) transferring property to the defendant, (2) saving, preserving or improving his property, (3) rendering personal services for him, or (4) performing for him a duty imposed directly by law or by his own contractual arrangements.

John W. Wade, *Restitution for Benefits Conferred Without Request*, 19 Vand. L. Rev. 1183 (1966).

Bankers Trust, as defendant, and the Commercial Finance Association and the New York Clearing House, as Amici Curiae on behalf of a large number of large banks, have argued in several different way one basic proposition: A secured creditor (a bank) should never be liable in restitution for benefits voluntarily conferred on it by an unsecured creditor (a warehouse or other supplier of goods and services). They argue that lending institutions should be exempt from the doctrine of unjust enrichment because otherwise equitable principles might upset the limited liability intended for banks under the U.C.C. The basic thrust of this categorical argument for the exemption of banks is concisely stated in the brief of the New York Clearing House at page 4:

> Disruption of the clear rules of the UCC [by application of principles of restitution] would undermine a commercial lender's ability to predict whether and to what extent it can obtain repayment of its loans. This uncertainty in turn would increase financing costs and, in some cases, lead to an unwillingness to provide financing to manufacturers and merchants.

There are several problems with this argument. *First*, even if it could be said somehow that *secured creditors* are a special class that generally speaking should be exempt from the law of restitution, that characterization does not accurately describe the Bank's transactions here. The Bank took complete title to the cotton with power to exercise control over it, and it fully exercised such control knowing that the warehouses expected payment for storage. The Bank was the owner of the cotton, and it should be treated as any other bailor of goods that are preserved by the bailee at a significant cost. The banks have cited no case in which a lending institution became the owner of goods, as here, and was exempt from the normal principles of restitution. The reason there is no case so holding is that the Rule of Law would be undermined by an exemption for banks from the principles of fair dealing that all other institutions and individuals must observe. There

is no reason to exempt the most powerful institutions in our society from laws that ordinary people must obey.

Second, the banks are wrong in asserting that this decision would undermine a lender's ability to predict recovery value on its loans. When Bankers Trust issued loans to the Julien Company, secured in part by warehouse receipts for cotton, the Bank knew that the warehouse receipts were worth only the value of the cotton minus any storage charges that would have to be paid before the cotton was released. The Julien Company's bankruptcy has to this point given the bank a windfall for the amount of the storage charges, an amount that no reasonable lender would have expected to collect at the time the loan was issued.

Finally, and most importantly, the argument that recovery on a restitution theory is never available in a case governed by the Uniform Commercial Code belies the explicit language of the Code. Section 1-103 states:

> Unless displaced by the particular provisions of chapters 1-9 of this title, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other

> validating or invalidating cause shall supplement its provisions.

Tenn. Code Ann. § 47-1-103 (1992). Thus, the warehouses in the present case are not barred from proceeding on a theory of unjust enrichment unless a particular Code provision explicitly displaces that equitable remedy. *See id.* cmt. 1 (stating that "this section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are *explicitly* displaced by this Act") (emphasis added). The theory of § 1-103 is contrary to the Bank's categorical contention that the warehouses as unsecured creditors must necessarily subsidize the Bank as a secured creditor by preserving its collateral without restitution.

Although a large number of commercial legal principles have been displaced by specific U.C.C. provisions, the rules of equity have not been so thoroughly subsumed by the Code. This is due to the distinct nature of legal and equitable rules and the effect of codification upon them. A primary function of any codification of common law, including the Code, is to displace prior *legal* rules. The same cannot be said of prior *equitable* principles. Equity was developed to do justice in individual cases by carving exceptions to and otherwise modifying legal rules. Thus, a codification of legal rules does not automatically displace the equitable principles

which supplement them. See the extensive discussion of this point in 1 James J. White and Robert S. Summers, *Uniform Commercial Code* § 5 at 19-20 (3d pract. ed. 1988) and Robert S. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 Nw. U. L. Rev. 906, 908-13 (1978). See also the discussion of the equitable rights of the unsecured creditor versus the secured creditor from a law and economics perspective in Lynn M. Lopucki, *The Unsecured Creditor's Bargain*, 80 Va. L. Rev. 1887 (1994).

Bankers Trust argues that U.C.C. section 7-502 specifically displaces the warehouses' unjust enrichment claim. That section lists the rights acquired by a holder to whom a warehouse receipt has been duly negotiated, and states that such a holder receives, in addition to title to the document and title to the goods, "the direct obligation of the issuer to hold or deliver the goods according to the terms of the document *free of any defense or claim by him* except those arising under the terms of the document or under this chapter." Tenn. Code Ann. § 47-7-502(d) (emphasis added). Because neither the warehouse receipt nor Article 7 specifically grants equitable remedies to the warehouses, the Bank argues that it should receive the cotton free of any such claim. However, section 7-502 must be read in conjunction with section 7-210. The latter provision, which explains the workings of the

warehouseman's lien, clearly states that the lien is not a warehouse's exclusive avenue of recovery from a receipt holder, but rather is a right "in addition to all other rights allowed by law to a creditor against his debtor." Tenn. Code Ann. § 47-7-210(7). Thus, Article 7 does not displace equitable remedies for warehouses against receipt holders; instead, and in harmony with the general directive of 1-103, it explicitly acknowledges that non-Code remedies can be employed.

Bankers Trust also makes the more general assertion that equitable claims, and specifically claims for unjust enrichment, should not be cognizable in cases in which they might produce results at odds with the priority system established in Article 9. The bank claims that this is a "majority rule" and cites several cases which may support this broad proposition. It is true that in *Peerless Packing Co. v. Malone & Hyde, Inc.*, 376 S.E.2d 161 (W.Va. 1988), the secured creditor of a grocer's inventory was allowed to prevail over unsecured creditors who claimed unjust enrichment for groceries delivered to an insolvent debtor. Also, in *Evans Products Co. v. Jorgensen*, 421 P.2d 978, 983 (Or. 1966), the court said that "[t]he purpose and effectiveness of the UCC would be sub-stantially impaired if interests created in compliance with UCC procedures could be defeated by application of the equitable doctrine of unjust enrichment." I am not

persuaded by these cases, which ignore the clear command of section 1-103 that equitable principles will apply unless specifically displaced. A secured creditor will not always be *unjustly* enriched by actions of an unsecured creditor that increase the value of the secured party's collateral, but the Code does not categorically reject the possibility that a secured lender could be unjustly enriched and forced to make restitution on that account. The contrary view of other state courts is much more consistent with the code and a system of fair dealing by banks, *see, e.g., Ninth District Production Credit Ass'n v. Ed Duggan, Inc.*, 821 P.2d 788 (Colo. 1991); *Producers Cotton Oil Co. v. Amstar Corp.*, 242 Cal.Rptr. 914 (1988).

Application of the Law of Unjust Enrichment to this Case Under Tennessee law,[1] recovery for unjust enrichment[2] is allowed where: 1) plaintiff confers a

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[1]Though many of the warehouses involved in this case are not situated within Tennessee, there has been no suggestion by any of the parties that any law other than Tennessee's should apply. The Julien Company's cotton transactions occurred in Tennessee, as did its transfer of the warehouse receipts.

[2]The Tennessee Supreme Court has recognized that "[a]ctions brought upon theories of unjust enrichment, quasi contract, contracts implied in law, and quantum meruit are essentially the same," and that courts use each of these various names to

benefit upon defendant; 2) defendant appreciates the benefit; 3) defendant accepts the benefit; and, most importantly, 4) it would be inequitable for defendant to retain the benefit without paying for it. *Paschall's Inc. v. J.P. Dozier*, 407 S.W.2d 150, 155 (Tenn. 1966). A more specific form of this rule, directly applicable to the circumstances of this case, is found in section 117 of the Restatement of Restitution, which outlines the principles of liability when one's property or credit is preserved by another. No categorical exemption is given to banks as secured creditors:

> § 117. Preservation of Another's Things or Credit.
>
> (1) A person who, although acting without the other's knowledge or consent, has preserved things belonging to another from damage or destruction, is entitled to restitution for services rendered or expenditures incurred therein, if
>
> (a) he was in lawful possession or custody of the things or if he lawfully took possession thereof, and

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"describe that class of implied obligations where, on the basis of justice and equity, the law will impose a contractual relationship between parties, regardless of their assent thereto." *Paschall's Inc. v. J.P. Dozier*, 407 S.W.2d 150, 154 (Tenn. 1966).

> the services or expenses were not made necessary by his breach of duty to the other, and
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> (b) it was reasonably necessary that the services should be rendered or the expenditures incurred before it was possible to communicate with the owner by reasonable means, and
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> (c) he had no reason to believe that the owner did not desire him so to act, and
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> (d) he intended to charge for such services or to retain the things as his own if the identity of the owner were not discovered or if the owner should disclaim, and
>
> (e) the things have been accepted by the owner.

Restatement of Restitution § 117(1) (1937).

It is hornbook law that the courts will not imply a contract between parties where an express contract already exists. *Jaffe v. Bolton*, 817 S.W.2d 19, 26 (Tenn. Ct. App. 1991). Because the Court has decided that no express contract existed between Bankers Trust and the warehouses, this rule would not be a barrier to finding an

implied contract in the present case. However, a related rule exists, which Bankers Trust has argued is applicable here:

> A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person.

Restatement of Restitution § 110 (1937) ("Restitution From Beneficiary of a Contract with Third Person Who Has Failed to Perform"). Section 110 finds expression in Tennessee law in the rule that "an implied undertaking cannot arise against one benefited by the work performed, where the work is done under a special contract with another." *Paschall's*, 407 S.W.2d at 154. An important caveat, however, is that this "general rule" is not applicable in those cases where the express "contract becomes unenforceable or invalid." *Id.* at 154-55.

Paschall's is instructive. The case involved an action by a contractor to recover for materials and labor furnished in the construction of an addition to a house. The addition was performed under contract with the daughter of the homeowner. The contractor, unable to recover from the daughter, sued the homeowner/parent on a theory of unjust enrichment, and the Tennessee Supreme

Court remanded the case to the trier of facts to allow this theory to proceed. In *Paschall's*, as here, the plaintiff had lost its right to recover under a statutorily granted lien. 407 S.W.2d at 152. The court held that this did not preclude an unjust enrichment recovery. *Id.* at 153. Additionally, the existence of an express contract between the plaintiff and the daughter did not bar the possibility of an equitable remedy where the contract became unenforceable due to the daughter's bankruptcy. *Id.* at 152, 154-55. In the present case, the warehouses have been unable to recover from the bankrupt Julien Company. Thus, the fact that Bankers Trust may have been a third-party beneficiary of a now-unenforceable contract between the warehouses and the Julien Company does not preclude the warehouses from raising an unjust enrichment claim against the bank.

A final argument made by Bankers Trust against the employment of equitable remedies against it by the warehouses is that it was not the owner of the cotton and, therefore, any benefit it received was only an indirect benefit, identical in nature to that received by any secured creditor due to an unsecured creditor's preservation or enhancement of the secured party's collateral. This argument is misplaced for two reasons. First, Bankers Trust was, as a holder of negotiable warehouse receipts for the cotton, the owner of the cotton under Article 7. *See* Tenn. Code Ann. § 47-7-502 ("a holder to whom a

negotiable document of title has been duly negotiated acquires . . . title to the goods"). Additionally, title to the goods does not appear to be a necessary element of unjust enrichment under Tennessee law. The correct question is whether Bankers Trust had a benefit conferred upon it by the warehouses, *see Paschall's*, 407 S.W.2d at 155, and this is a question for the finder of fact.

Because the U.C.C. does not bar the warehouses' "implied contract" or restitution claim against Bankers Trust, on this appeal from summary judgment, the proper inquiry for this Court should be whether a reasonable finder of fact could conclude that the facts, when taken in the light most favorable to the warehouses, would allow recovery under a theory of unjust enrichment. It is clear that a finder of fact could so conclude, under the theory of unjust enrichment given in *Paschall's* or, more specifically, in section 117 of the Restatement of Restitution. Section 117 is particularly helpful because, rather than simply stating that the most important factor for a restitutionary recovery is whether the enrichment at issue was unjust, it gives specific standards for determining when the preservation of another's things should be compensable.

The facts in the appellate record suggest that: The warehouses, in lawful possession of the cotton, acted to store and preserve the cotton for the benefit of the Bank as owner of the cotton without the express consent of the

Bank. The benefit was not forced on the Bank against its will. When the Bank ceased taking warehouse receipts and funding the Julien Company, and then placed it into involuntary bankruptcy, it was well aware that the warehouse charges were unpaid and that it had accepted the benefit of their storage services. The benefits were conferred on the Bank before the warehouses received letters of notification that the Bank had become the owner of the cotton through transfer of the warehouse receipts by the Julien Company to the Bank. The warehouses had no reason to believe that the owner of the cotton did not want the warehouses to preserve the cotton from loss or damage. The warehouses intended to charge a storage fee for their services, and the Bank as owner acknowledged and accepted ownership of the cotton. In each instance before shipment of the cotton, the Bank established a commercial relationship with the warehouse. Each time it wrote a letter to the warehouse giving the shipping instruction and saying that "the documents [warehouse receipts showing ownership in the Bank, bills of lading, and shipping instructions] were at all times to be held and handled by you in trust for our account." The Bank as owner had complete control over the warehouse receipts and hence complete control of the cotton. The Bank, as owner of the cotton, directly and knowingly requested by letter and used the services of the warehouses. Thereafter, the Bank

accepted the proceeds for the sale of the cotton which the warehouses had preserved.

A finder of fact, based on the above alleged facts, could conclude that Bankers Trust was unjustly enriched by the warehouses for the value of the storage costs not paid by the Julien Company. The fact finder would not have to find *unjust* enrichment. Although the Court has held that the warehouse receipts made the Bank the owner of the cotton, in deciding whether the enrichment was unjust, the finder of fact should consider, and might credit, the Bank's claim that at all times it acted only as a normal secured creditor. In this regard it should be noted that, had the bank physically held the cotton as collateral, it would have incurred storage costs as a part of its independent duty under the U.C.C. to use "reasonable care in the custody and preservation of collateral in [its] possession." Tenn. Code Ann. § 47-9-207(1). *See Knox v. Phoenix Leasing Inc.*, 35 Cal.Rptr.2d 141, 148 (1994) (citing § 9-207 and stating that, where collateral is perishable, "the unsecured status of the creditor appears less important than the fact that the secured creditor directly benefits from expenditures the creditor is spared having to make on its own behalf"). Also important to the question of unjust enrichment would be whether it was a reasonable custom of the cotton marketplace for the warehouses to waive the statutorily-granted liens that would have allowed them to collect storage costs before releasing the cotton.

The precise scope of inquiry that a finder of fact should undertake in a case such as this is highlighted by reference to the source of disagreement between the majority and dissenting justices in *Ninth District Production Credit Ass'n v. Ed Duggan, Inc.*, 821 P.2d 788 (Colo. 1991). In *Duggan* an unsecured supplier of corn to a feed lot brought an unjust enrichment claim against a secured creditor who held a properly perfected security interest in the feed lot's assets. The Supreme Court of Colorado, sitting *en banc*, agreed with the trial and intermediate appellate courts that an unjust enrichment claim was not automatically precluded by the secured creditor's possession of an interest given priority under the Uniform Commercial Code. The court articulated a standard: "Where a secured creditor is benefitted by a transaction between its debtor and an unsecured creditor that enhances the value of the secured collateral, and the secured creditor initiates or encourages the transaction, the secured creditor can be held liable to the unsecured creditor on the theory of unjust enrichment." *Id.* at 801. The court reversed and remanded the case to clarify that: 1) the secured creditor must initiate or encourage the transaction in order for the enrichment to be unjust, and 2) the jury instructions should explain the interrelation of the doctrine of unjust enrichment and Article 9 of the U.C.C. The dissent claimed that the majority's standard imposed requirements not otherwise found in the law of equity, and that the

U.C.C. status of the parties was irrelevant to the case. *Id.* at 804 & n.7. Both the majority and dissent make good points, but neither is entirely correct as I understand the law of implied contract.[3]

I disagree with *Duggan* majority's contention that a secured party must "initiate or encourage the transaction" before an unsecured creditor can ever recover on a theory of unjust enrichment. As conceded in *Duggan* itself, acquiescence by the secured creditor might be enough if the unsecured creditor's actions were necessary to preserve the secured collateral. 812 P.2d at 797 n.7 (citing *Producers Cotton Oil Co. v. Amstar Corp.*, 242 Cal.Rptr. 914 (1988)). Also, the "initiate or encourage" element is contrary to Restatement of Restitution § 117, which does not require the party benefited to have initiated or

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[3]Some confusion may be based on the difference between a contract implied in fact and one implied in law. A contract implied in fact is akin to an express contract; it is based on a tacit, rather than a stated or written, agreement between the parties, and ordinary rules of contract law apply. Contracts implied in law are creations of equity, and are not based upon the *intention of the parties to contract*. *See Paschall's*, 407 S.W.2d at 154. Still, the intentions of the parties and the overall background of the transaction can be important to the determination of whether the enrichment alleged in an implied contract claim is unjust.

encouraged the transaction. I agree with the *Duggan* majority, however, that the finder of fact should be informed of the U.C.C. status of the parties as a factor in deciding whether a secured party's retention of a benefit conferred by an unsecured party would be inequitable. The dissent's position that a party's status as a secured creditor is "not relevant" to whether an implied contract exists would not give the finder of fact the information with which to judge the true inequity of a transaction.

The District Court was therefore in error in this diversity case in granting summary judgment to the Bank on the restitution or implied contract claims of the warehouses. Based on *Paschall's* and other restitution cases, Tennessee courts would apply the principles of § 117 of the Restatement of Restitution, which preclude summary judgment and require submission of the claim to the fact finder for resolution.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUDGMENT

Case Nº. 94-5582

United States Court of Appeals
for the Sixth Court

Bluebonnet Warehouse Cooperative;
Federal Compress & Warehouse Company, Inc.
Plaintiffs,

Blytheville Compress Co., Inc., et al.,
Plaintiffs - Appellants,

v.

Bankers Trust Company,
Defendant - Appellee.

Before: MERRITT, Chief Judge;
MARTIN, Circuit Judge;
SIMPSON, Chief District Judge.

JUDGMENT

ON APPEAL from the Unites States District Court for the Western District of Tennessee at Memphis.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

Issued as Mandate: 9/6/96

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

A True Copy.

Attest:

/s/ Diane Schnur
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO STRIKE CERTAIN AFFIDAVITS

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BLUEBONNET WAREHOUSING CORP., ET AL.,	)	
Plaintiffs,	)	
vs.	)	No. 91-2399-TUB
BANKERS TRUST COMPANY, A MEMBER OF BANKERS TRUST OF NEW YORK CORPORATION, A CORPORATION,	)	
Defendant.	)	

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANT'S MOTION TO STRIKE CERTAIN AFFIDAVITS

Plaintiff Bluebonnet Warehousing Corp. filed this diversity action on May 24, 1991, with 34 other named plaintiffs[1] (collectively referred to as ("plaintiffs" or "warehouses") against Bankers Trust Company ("Bankers Trust") alleging breach of contract. Plaintiffs contend that Bankers Trust, through its agent, L&S Cotton Systems, Inc. ("L&S"), was the "bearer" of and "surrendered" negotiable warehouse

[1] On March 15, 1994, a Consent Order of Dismissal with Prejudice as to Federal Compress & Warehouse Co., Inc.'s action against Bankers Trust Company was entered.

receipts to plaintiffs for certain bales of cotton stored in plaintiffs' warehouses. Allegedly, per the terms contained in the receipts and applicable tariffs, Bankers Trust became contractually liable for payment of the accrued storage charges.

Presently before the court are: Bankers Trust's Motion for Summary Judgment; Plaintiffs' Motion for Partial Summary Judgment;

I.

This suit is an outgrowth of an involuntary bankruptcy action against The Julien Company ("TJC") filed in the United States Bankruptcy Court of this district. A brief description of the financial dealings and contractual arrangements of the industry and the parties is necessary to understand the issues presented to the court. The basic underlying facts are not in dispute.

After cotton is harvested, it is ginned, graded, and then compressed into bales weighing approximately 500 pounds and stored in warehouses pending further transactions. Plaintiffs are 35 cotton compress and warehousing businesses that provide such services and storage.[2] When the bales are delivered to the ware-

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[2] Some of the warehouses are federally licensed pursuant to 7 U.S.C. § 244 et seq., while others are state regulated.

houses, the warehouse issues a receipt to the owner for each bale and "tags" the bale with the corresponding receipt number. Such warehouse receipts are either negotiable, see R. E. Huntley Cotton Co. v. Fields, 551 S.W.2d 472 (Tex. Ct. App. 1977) (bearer receipt negotiable without indorsement), or non-negotiable[3] documents of title, entitling the bearer or named individual respectively to reclaim the corresponding bale of cotton upon payment of the warehouseman's lien for accumulated charges. Applicable state and federal statutes prescribe the essential terms required in such receipts. See. e.g., 7 U.S.C. § 260; 7 C.F.R. § 735.16; U.C.C. § 7-202(2).[4] Such warehouse

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[3] See Ray D. Henson, Documents of Title Under the Uniform Commercial Code 132 (2d ed. 1990) ("If the goods are deliverable to the order of a named person, negotiation requires that person's indorsement and delivery"). From the depositions cited by the parties, however, it appears that warehouse receipts are generally issued as negotiable instruments. See Br. of Def. at 16-17. See also Farmers Elevator Mutual Ins. Co. v. Jewett, 394 F.2d 896, 899 (10th Cir. 1968) (holding that Warehouse Act establishes warehouse receipts as secure and readily negotiable).

[4] Article 7 of the Uniform Commercial Code has been adopted by each state where the defendant

receipts usually contain language stating "upon surrender of this receipt and the payment of all liens due the warehouseman, said cotton will be delivered to the bearer." See Ex. 1-3, Def. Mot. for Summ. J. (copies of negotiable warehouse receipts of Dunavant Warehouse, Bluebonnet Warehousing Corp., and Producers Warehouse No.1.). See also 7 C.F.R. § 735.16(b) (negotiable and non-negotiable warehouse receipts "effective until surrendered for delivery of the cotton").

Cotton merchants acquire ownership in cotton by purchasing it from an original producer or another merchant. However, in most cases for convenience and economy, rather than taking physical possession of the cotton itself, the purchaser receives the document of title

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warehouses are located. E.g., Ala. Code § 7-7-101; Ark. Code Anno. § 4-7-101; La. Rev. Stat. Anno. § 10:7-101; Miss. Code Anno. § 75-7-101; Tenn. Code Anno. § 47-7-101; Tex. Bus. & Com. Code Anno. § 7.101. For convenience, the court will cite to the applicable Uniform Commercial Code section. The U.C.C. (state law) and the Warehouse Act (federal law) apply here because the federal law does not preempt the U.C.C. See 7 U.S.C. § 269 (specifically provides for cooperation between federal licensing officials and state warehouse regulators). The U.C.C. does not contradict the Warehouse Act.

representing the stored cotton, the warehouse receipt. The cotton merchant subsequently sells the cotton to customers or trades it to other merchants. In this way, simply by transfer of the negotiable warehouse receipt, the cotton may be sold several times without the bale itself ever moving from its original storage location. Transactions are thus facilitated and substantial cotton relocation expenses are saved. Most, if not all, cotton merchants, such as TJC before its bankruptcy, leverage such cotton purchases through lenders like Bankers Trust, by borrowing as much as 80-85% of the purchase price. The negotiable warehouse receipts, which are documents of title, are used as collateral for such loans. To perfect its security interest in the collateral, the lenders require that the negotiable warehouse receipts be retained in their possession rather than the cotton merchant's. See U.C.C. §§ 9-304(2), -305.[5] Sometimes one or more of such lenders or other entities may act as "collateral custodians" for the actual lenders and retain the warehouse receipts as agents for the actual lender.

In the instant case, Bankers Trust financed TJC in its business as a cotton merchant and perfected its collateral security interest by taking possession of TJC's warehouse receipts. However, rather than itself maintaining physical

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[5] This type of perfection is, of course, referred to as a pledge.

custody of the receipts, Bankers Trust entered into an agreement with L&S providing that L&S would serve as Bankers Trust's collateral sub-custodian and perform the actual day-to-day custodial services. By retaining the negotiable warehouse receipts in the possession of its agent, L&S, it is undisputed that Bankers Trust was able to exercise control over them.

For TJC to complete a sale to an end-user, such as a cotton mill, the bale of cotton had to be shipped from the warehouse to the buyer's factory or mill. This necessitated the release of the bale by the warehouse, but since title to the cotton followed the negotiable warehouse receipt, the receipt had to be forwarded from the offices of L&S to the warehouse before the shipment occurred. U.C.C. § 7-502(1)(b). However, if L&S surrendered possession of the receipt, the perfected security interest of Bankers Trust would be extinguished. See U.C.C. § 9-305; see also U.C.C. § 9-309 (priority given to holder in due course of negotiable instrument over perfected security interest; therefore, possession of negotiable document must be maintained at all times to maintain priority); United States v. Hext, 444 F.2d 804 (5th Cir. 1971) (security interest in cotton subordinate to interest of presenter of warehouse receipt who had no actual knowledge of prior interest). Therefore, without possession of the receipts, it is possible that the interests of a subsequent holder of the receipt or some other creditor would be superior to claims by the lender of their collateral interest in the cotton. To protect

Banker Trust's perfected security interest, a "transmittal letter" was issued on L&S letterhead which was designed to serve as a "bailee with notice" device as authorized by U.C.C. § 9-305.[6] By putting the bailee on notice of its security interest in the warehouse receipts, Banker's Trust was able to maintain its security interest in the receipts or the substitute bills of lading even though it had temporarily given up actual possession of the receipt. In this way Bankers Trust could retain a form of constructive possession by informing the warehouse that the negotiable receipts were being forwarded in trust with the warehouse serving as a bailee of the receipt.

Under the contractual arrangement between TJC, Banker's Trust, and L&S, and according to their course of conduct, whenever TJC negotiated the sale of cotton to a third party, it prepared a "transmittal letter" on L&S

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[6] U.C.C. § 9-305 contemplates that possession of the documents through an agent as bailee will be sufficient to maintain the pledgee's possession. To maintain priority the bank must maintain possession of the negotiable document of title -- the warehouse receipt, not necessarily the cotton. Therefore, the warehouse becomes the bailee with notice of the secured party's security interest in the "documents of title."

stationery in the following form:

To:
Warehouse: [Name of Compress or Warehouse]
Street Address: [Address]
City & State: [City, State]

Gentlemen:

We are enclosing for our account bills of lading and/or warehouse receipts together with shipping instructions as listed below in the name of The Julien Company.

The enclosed documents are at all time to be held and handled by you in trust for our account and when the loadings and/or warehouse receipts are signed they must be returned to L & S Cotton Systems.

Please receipt us for the above documents and handle in accordance with instructions.

Yours faithfully,

L & S Cotton Systems

No. of Bales	Mark	Destination
xx	xxxxx	xxxxxxxxxxx

To L & S Cotton Systems Memphis, TN

Please forward [sic] the warehouse receipts or bills of lading, to be handled in trust for you (sic] account, to the above mentioned addressee, to be exchanged for bills of lading and/or warehouse receipts.

THE JULIEN COMPANY

By_____

Additionally, TJC employees prepared a "tag list" which indicated the specific bales of cotton to be shipped. TJC employees who were located in the offices of L&S then pulled the warehouse receipts specified on the tag list. The "transmittal letter" along with the tag list, warehouse receipts, and bills of lading to be issued by the carriers upon shipment were then forwarded to the designated warehouse for shipping and disposition.

Although the plaintiffs had a lien on the cotton for the warehouse charges under both state and federal law, see 7 U.S.C. § 262; U.C.C. § 7-403(2), and did not have to ship it until the lien was fully paid, TJC and plaintiffs had apparently arranged for shipment to be made without payment of the warehouseman's lien first being made. As a result of the shipment without collection of the lien charges,

the warehouseman lost his lien.[7] After the cotton had been shipped per the instructions, plaintiffs invoiced TJC for all accrued charges. All went well under this course of conduct until TJC was placed in bankruptcy pursuant to an involuntary petition under Chapter 11.

During the course of that bankruptcy action, 30 of the 35 plaintiffs filed separate adverse claims against the bankrupt TJC asserting general liens against other TJC cotton which plaintiffs still held in their warehouses to cover the unpaid fees for cotton already shipped under the arrangement they had with TJC. See In re The Julien Co., No. 90-20283-B (Banker. W.D. Tenn. Feb.17, 1992) (Nos. 90-0066, 90-0051). In essence, plaintiffs sought to recover from TJC's estate the same storage charges that they seek to recover in this action. At approximately the same time that plaintiffs filed their adverse claims in the bankruptcy proceeding, they commenced this action asserting that warehouse charges were due from Bankers Trust under a separate contract theory.

II.

To support their respective motions for summary judgment, the parties have filed depositions and affidavits of various individuals employed by each of the principals

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[7] "A warehouse man loses his lien on any goods which he voluntarily delivers . . . " U.C.C. § 7-209(4).

involved (TJC, L&S, Bankers Trust, and 34 of the 35 plaintiffs), affidavits from certain bankers and experts involved in the industry, copies of the typical pertinent documents involved (transmittal letter, warehouse receipts, etc.), as well as copies of some of the bankruptcy proceedings. Bankers Trust has moved to strike or disregard portions of plaintiffs' supporting affidavits.[8] In the main, Bankers Trust contends that various affidavits contain: factual statements that are contradictory to the affiant's prior deposition testimony; statements that are legal conclusions or legal opinions; and, factual material that is beyond the personal knowledge of the affiant. Plaintiffs' response is an unsupported assertion that the affidavits are sufficient.

Considering the requirements necessary for an affidavit to meet the standards set forth in Rule 56(e), the court has generally reviewed all of the affidavits and notes that Bankers Trust's objections are not without basis. Accordingly, and for purposes of brevity, this court will disregard the inadmissible portions of the challenged affidavits in considering the parties' motions for summary judgment.

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[8] Plaintiffs also suggest in brief, that portions of defendant's affidavits should be stricken, but they have not filed a motion to that effect.

III.

Under Rule 56 of the Federal Rules of Civil Procedure, the moving party is entitled to summary judgment where there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. Summary judgment is not "a disfavored procedural shortcut, but rather an integral part of the Federal Rules . . . designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

The Supreme Court has also emphasized that there is no genuine issue of fact where the evidence supporting a claim is "merely colorable," Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986), or "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Electric Industrial Co., Ltd v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Further the substantive law governing the case will determine what issues of fact are material and the proper inquiry is the same as that used on federal directed verdict motions, -- "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

On a motion for summary judgment "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. at 255; accord Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. at 587. Where the parties have submitted cross-motions for summary judgment, the court addresses "each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Taft Broadcasting Co. v. United States, 929 F.2d 240, 248 (6th Cir. 1991) (quoting Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1391 (Fed. Cir. 1987)).

IV.

The basis of the plaintiffs' motion for partial summary judgment is that the defendant is indebted to them under one of two theories: that the defendant entered into either an express or an implied contract to pay the warehouse storage charges.

In the first instance, express contract, the plaintiffs contend that Bankers Trust surrendered the warehouse receipts through its agent, L&S, when it allowed them to be forwarded to the plaintiff warehouses along with the shipping instructions and transmittal letter. According to the plaintiffs, when Bankers Trust surrendered the warehouse receipts which it held as a secured party in

possession of the collateral, it became liable under the terms of the "expressed written bailment contracts (tariff and warehouse receipt)." (Mem. in Supp. of Pls.' Mot. for Partial Summ. J., filed June 3, 1992, at 14 [hereinafter "Memo., June 3, 1992"]). Plaintiffs recognize without argument that once they allowed the cotton to be shipped from their warehouses without having collected the storage charges, they lost their statutory liens on the cotton shipped.[9] "The warehousemen made a credit decision to waive that lien without demanding payment before shipping

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[9] U.C.S. § 7-209(1) provides that "[a] warehouseman has a lien against the bailor of the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation . . . insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. . . . But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount are at a rate specified on the receipt or if no charges or so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt." As noted, subsection 4 of this code provision provides that "[a] warehouseman loses his lien on any goods which he voluntarily delivers . . . ."

the cotton." Memo, June 3, 1992 at 13-14.

Plaintiffs contend, however, that since they had held a lien on the cotton which was effective against L&S, as the agent of Bankers Trust, "it logically follows that if the warehouse waived its lien as to L & S, it still maintained its legal right to demand payment from the same party that was subject to the lien." Memo., June 3, 1992, at 17. Plaintiffs present no legal authority to support an argument that the earlier existence of a lien that could have been asserted against L&S before waiver somehow created an additional contractual obligation on the part of L&S (or Bankers Trust) to pay the storage charges.[10] Of course, if the plaintiffs can show that L&S had entered into an express contract to pay the storage charges, then the plaintiffs are entitled to recover on the contract regardless

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[10] Plaintiffs earlier in their Memorandum cited statements from Am. Jur. 2d and C.J.S., one of which states: "The surrendering party remains liable for the accrued charges." No statutory or case authority is cited, however, to support that conclusion and the court does not find the treatises persuasive authority. Cases cited by the plaintiffs do recognize that a warehouseman does not forfeit his contractual rights simply by waiving his lien. See Memo., June 3, 1992, at 14-15. This proposition is well taken, but is not in issue in these motions.

of their waiver of their liens. This point is not disputed by the defendant.

The plaintiffs argue that the warehouse receipts and the underlying tariffs, taken together, constitute an express contract between them and Bankers Trust, through its agent, L&S, which obligates Bankers Trust to pay the storage charges. Plaintiffs point out that the warehouse receipts were each "bearer" documents and the "bearer" is a "person in possession of an instrument, document of title, or certificated security payable to bearer or endorsed in blank." U.C.C. § 1-201. Plaintiffs say this definition is similar to that of a "holder," which is defined in U.C.C. § 1-201 as a "person who is in possession of a document of title . . . issued or endorsed to him or to his order or to bearer . . ." and cites the holding of Union Compress and Warehouse Co. v. Mabus, 217 So.2d 23, 26 (Miss. 1968): "The holder of the warehouse receipt . . . is required to pay all storage due on the cotton at the time it is removed from the warehouse." The Union Compress case involved a dispute between the farmer who stored cotton at the warehouse and the warehouseman who had promised to pay a rebate to farmers who used its warehouse. It had nothing to do with the question of whether a "bearer" or "holder" of a warehouse receipt is contractually obligated to pay storage charges when the warehouseman waives his lien. The quotation above concerning a requirement that the holder must pay storage charges did not refer to any contractual obligation of the holder; this dicta merely recognized that

a holder who wishes to obtain the cotton is subject by lien to pay the storage charges before he has a legal right to take possession of the cotton. Certainly it is not authority for the proposition that the bearer or holder of a negotiable warehouse receipt is contractually liable for the accrued storage charges once the warehouseman's lien is waived. The Uniform Commercial Code specifically provides that: "The mere existence of a security interest . . . does not impose Contract or tort liability upon the secured party for the debtor's acts or omissions." U.C.C. § 9-317. It is therefore indisputable that the defendant's status as bearer or holder did in and of itself impose upon Bankers Trust the contractual obligations undertaken by the original bailor of the cotton at the time the receipt was issued.

Plaintiffs also point out that each of the warehouse receipts in this case incorporate by reference tariffs issued by the warehouses which set the rates for storage and other services and assert that these tariffs require that the party surrendering or shipping the warehouse receipts to the warehouseman be responsible for all accrued charges. Indeed some of the tariffs do contain language pertaining to payment of accrued charges by the shipper or person surrendering the receipt.[11] Plaintiffs apparently contend

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[11] See Exhibit 13 to Pls.' Mot. for Partial Summ. J. for a summarization of the tariff language concerning the responsibility to pay the warehouse charges. Most but not

that since the warehouse receipt and tariff, viewed together, contain such language and since the defendant surrendered the receipts, an express contract was created between the plaintiffs and the defendant which obligates Bankers Trust to pay all accrued charges.

The plaintiffs do not, however, argue that the defendant, either itself or through its agent L&S, ever expressly agreed, orally or in writing, that it would pay the plaintiffs' accrued charges. The record reveals that there were no discussions between the defendant and the plaintiffs prior to shipment of the cotton[12] Such an agreement is the

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all have language that states: "All accrued charges will be billed to and collected from the parties surrendering the warehouse receipt."

[12] The plaintiffs have not presented any evidence or argument that the original contract for storage entered into between the bailor, presumably the farmer who grew the cotton, and the plaintiffs was assumed by Bankers Trust by novation and the court does not address that issue further except to note that a novation would also require the defendant's express agreement. Warrior Drilling & Engineering Co. v. King, 446 So.2d 31 (Ala. 1984); Scott v. Bank of Coushatta, 512 So.2d 356 (La. 1987); Greenwood Leflore Hospital Comm'n v. Turner, 56 So.2d 496 (Miss. 1952); Chastainv. Cooper & Reed,

very essence of an express contract and without it there cannot be an express contract. See, e.g. 17 C.J.S. Contracts § 30 ("There can be no contract in the true sense, that is, as distinguished from quasi or constructive contracts, in the absence of the element of agreement, or of mutual assent of the parties."); Christian v. Rabren, 273 So.2d 459 (Ala. 1973); Baton Rouge General Hospital v. Superior Cleaners, 93 So.2d 20 (La. 1956); Mississippi State Highway Comm'n v Sanders, 269 So.2d 350 (Miss. 1972); Roy McAmis Disposal Service. Inc. v Hiwassee Systems. Inc., 613 S.W.2d 226 (Tenn. Ct. App. 1979); Austin v. Strong, 1 S.W.2d 872 (Tex. 1928). The plaintiffs cannot prevail on the theory that there was an express contract between them and the defendant.

The warehousemen also assert that Bankers Trust is liable on the theory of implied contract. Essentially the plaintiffs contend that, if Bankers Trust is not obligated by an express contract, it should be required to pay the accrued storage charges because it, having taken control of the receipts as a secured party and having surrendered them to the warehousemen along with the transmittal over the cotton and impliedly agreed to pay all storage charges that had theretofore been incurred on that cotton. The

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257 S.W.2d 422 (Tex. 1953); Shoemaker Piano Mfg. Co. v. Bernard, 70 Tenn. 358 (Tenn. 1879).

undisputed facts, however, reflect that there is simply not sufficient evidence for a reasonable jury to conclude that the conduct of Bankers Trust constituted an implied agreement or promise to pay the storage charges upon shipment of the cotton if the plaintiffs failed to exercise on their liens.

In more detail the plaintiffs contend that Bankers Trust, as a secured lender by pledge and acting through its agent L&S, took possession and exercised complete control over the warehouse receipts issued by the plaintiffs. Plaintiffs, relying on Citizens Co-op v. United States, 427 F.2d 692 (5th Cir. 1970)[13], argue that the "L&S had

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[13] Plaintiffs rely on the court's statement in Citizens Co-Op that "[i]t is well understood in commercial practice that possession of a negotiable warehouse receipt is constructive possession of the goods represented by that receipt . . . Possession of the warehouse receipt so controls the right to actual possession of the goods represented by the receipt that possession of the receipt is for the most part equivalent to possession of the property." Citizens Co-Op, 427 F.2d at 697.

The issue in Citizens Co-Op questioned the priority of a federal tax lien over the cotton harvester and ginner, who claimed priority possessory liens for their services in the amount of approximately $1,300. The United States contended that the harvester and the ginner had lost their liens when they delivered the cotton to the

possession of the subject cotton by receiving actual possession of the warehouse receipts." Memo., June 3, 1992, at 20-21. Further the plaintiffs contend that the defendant exercised complete control and management of the cotton by delivering the receipts to the warehouses for their own account. Relying on Millichamp v. First

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warehouse and took the receipts in exchange. The court rejected this narrow construction of possession and held that the legal right to control the possession of the cotton by virtue of holding the receipts was sufficient to prevail against the government's argument that the harvester and ginner had waived their possessory liens in the cotton when they warehoused it and took the receipts in return. It stretches this holding too far to suggest that L&S's possession of the receipts, in itself, constituted an implied promise to pay all accrued storage charges because those receipts gave it the authority, as against the warehouseman, to control possession of the cotton upon payment of the warehousemen's liens. See U.C.C. § 9-317. In Driggs v. Dean, 60 N.E. 336, 338 (N.Y. 1901), the court noted: "[a) person,therefore, who becomes a holder of a warehouse receipt, as collateral security, does not by reason of his having the possession of the receipt necessarily become bound for the storage of the property. . . . He, however, is not bound . . . to pay the charges thereon."

National Bank of Toppenish, 226 P. 490 (Wash. 1924), and Driggs v. Dean, 60 N.E. 336 (N.Y. 1901), the plaintiffs argue that this conduct implied a promise on the part of the defendant to pay the storage charges that had accrued on the cotton since it was deposited with the plaintiff warehouses.

In Driggs, Von Angern placed 2,463 barrels of a product identified as cement in the Driggs warehouse and then pledged the two warehouse receipts issued by Driggs as collateral for payment of a note at the bank. Von Angern defaulted on his note and the bank called upon his guarantors to pay the note which they did. The bank delivered its collateral, the two warehouse receipts, to the guarantors, one of whom then examined the goods at the warehouse and, when asked by the warehouseman if it should make out the bill for the accrued storage charges, replied "Yes, you had better." Litigation then ensued when the guarantors sued the warehouseman Driggs about the content of the barrels. When that litigation was over, Driggs sued the guarantors for the storage court granted a directed verdict for Driggs, but the Court of Appeals of New York reversed and remanded for a jury trial. In the appellate opinion the court made statements, upon which the plaintiffs here rely, concerning a secured party's liability for storage charges. The court held:

> A person to whom a warehouse receipt has been transferred by endorsement and delivery, as collateral security, is vested with a qualified title which

> gives him the right to take possession of the property upon the surrender and cancellation of the receipt. The right that he acquires is not an absolute title, for the owner may redeem and the right of possession is subject to the liens of the warehouseman for storage. . . . A person, therefore, who becomes a holder of the warehouse receipt, as collateral security, does not by reason of his having taken possession of the receipt necessarily became bound for the storage of the property. It is true he has a qualified title and he may, if he so elects, take or reduce the property to possession upon payment of the storage. He, however, is not bound to take possession of the property or to pay the charges thereon. . . . [The defendants] had the right to inquire of the warehouseman as to the amount of claims held against the property for storage and to examine it for the purpose of determining whether it was of value sufficient to meet the charges before taking possession. If, after ascertaining these facts, they took possession, either actual or constructive or did any act indicating a purpose to take the control and management of the property, they thereafter became liable for the subsequent storage of the property.

Driggs, 60 N.E. at 337-38 (emphasis added).

Later in Millichamp, another case relied upon by plaintiffs in brief, the Washington Supreme Court addressed

the issue of whether a bank which held a collateral interest in a warehouse receipt was liable for storage. The warehouseman contended that the bank, as pledgee and secured holder of the receipt, had title and possession and therefore was liable for the storage charges. The bank on the other hand contended that it was only a qualified owner and would be liable for storage only in the event that it took some active steps to reduce the stored property to possession or assumed control over it. The court stated that the facts were almost identical to the facts in Driggs and concluded on that authority that the warehouseman was not entitled to recover the storage charges from the secured holder of the warehouse receipt. Millichamp, 226 P. at 491-92. In Millichamp it is unclear whether the warehouseman was attempting to recover for storage charges that had accrued prior to any involvement of the secured party but it was entirely clear in Driggs that the only storage charges at issue were those which accrued after the secured parties, as the parties entitled to control the stored property, had actually come to the warehouse and allegedly assumed control. The fact that the Millichamp court states that the facts in that case are "almost identical" to the facts in the Driggs case compels that the holding of Millichamp be limited to facts similar to those stated in Driggs, that is, to a claim for storage subsequent to the alleged assertion of control by the secured holder of the receipt.

It is on the basis of these two cases that the plaintiffs contend that the secured party as pledgee, holder and bearer of the receipts impliedly contracted to pay the accrued storage charges when it surrendered the receipts in trust to permit the shipment of the cotton to its purchaser. Neither of these cases can be viewed as substantial support for that argument. In Driggs, as noted, the claim only involved storage charges that accrued after the secured party had taken steps that were arguably consistent with it having asserted its control and management over the stored property after default. The court did not even address the question of whether a secured party might be liable for storage charges that accrued prior to default. Moreover, since the Millichamp court specifically stated that its facts were the same as those in Driggs, its holding, as noted, cannot reasonably be applied to storage charges that had accrued prior to the alleged acts of control by the secured party.

Regardless of the limitations of the holdings in Driggs and Millichamp., plaintiffs contend that the conduct of the defendant through L&S in surrendering the warehouse receipts accompanied by shipping instructions constituted an implied promise to the plaintiffs that Bankers Trust would pay the storage charges that had accrued prior to the shipment of the cotton. This contention is premised on plaintiffs' argument that the tariffs issued by the plaintiffs and referred to in the warehouse receipts provide

that the surrendering party or shipper shall be responsible for accrued storage charges.

The court concludes, as have both parties, that the material facts relative to this issue are not in dispute. The court also concludes that, even if there is any dispute of material fact in this fairly voluminous record the evidence would be insufficient for a reasonable jury to conclude that the defendant had impliedly promised to pay the warehousemen for the accrued storage charges.

The warehouse receipts in this case are not identical, but for the most part they are highly similar. Some were issued pursuant to the United States Warehouse Act which is codified at 7 U.S.C. §§ 241-273, and others were issued under the laws of the states where the warehouses are located. An example of these receipts is the one used by the plaintiff Bluebonnet Warehousing Corporation, which is contained in the record as an exhibit to the plaintiffs' motion for summary judgment. It provides in part:

> Said bale of cotton described herein stored in the above mentioned warehouse will be delivered to bearer upon surrender of this receipt and payment of all charges. . . . A lien is reserved by the undersigned for storage, handling and other charges per contract and lease with the industry served the amount of which is unknown at this time.

On the opposite side of the receipt it provides in part:

> A lien on said one bale of cotton is hereby reserved for all charges accrued and to accrue under the certified tariff in use by the warehouseman as approved and published by Joint Cotton Exchange Inspection Bureau Agency. . . . Upon the surrender of this receipt and the payment of all charges due the warehouseman, the said one bale of cotton will be delivered to the bearer.

The tariff referred to in the quoted receipt lists various charges for storage and handling of the cotton, that is the consideration to be paid to the warehouseman under his contract with the bailor of the cotton. It covers, for example, the charge for receiving, compressing and storing the cotton. In many cases the tariffs, which are not particularly uniform, contain language that governs the contract between the depositor and the warehouse. The Bluebonnet tariff contains the following provisions:

> 1. GENERAL
>
> . . . . .
>
> (b) Anyone delivering cotton to Bluebonnet is hereinafter sometimes called 'the depositor.'
>
> (c) The rights, privileges and duties of the depositor and Bluebonnet shall be governed solely by this tariff, including these General Conditions, and the

warehouse receipt issued by Bluebonnet, the same constituting the entire contract between the parties.

. . . . .

(f) Any depositor and any person acquiring title to cotton in the possession of Bluebonnet shall be deemed to have full knowledge of and to have consented to and be bound by all the provisions of the provisions hereof.

. . . . .

3. STORAGE PERIOD AND CHARGES

. . . . .

(b) . . . Except as otherwise stated in the tariff, all other charges follow the cotton and will be billed against the shipper at the time of shipment. At the option of Bluebonnet, payment in full of all accrued charges may be required before performing any additional services, including but not limited to shipping. . . .

. . . . .

8. UNIFORM COMMERCIAL CODE

(a) The receipt, storage and shipment of cotton are subject to applicable rules and regulations, including

the provisions of the Uniform Commercial Code of the State of Texas.

Most of the receipts involved in this case were issued pursuant to the United States Warehouse Act. The receipts used by Central States Cotton Company are typical, but again not identical. In part the receipt provides:

> Upon the surrender of this receipt and the payment of all liens due the warehouseman, said cotton will be delivered to the bearer.
>
> . . . . .
>
> The warehouseman claims a lien for services as described herein and any other charges (f)or services requested according to the tariff in effect on the date such services are performed. Full amount of charges furnished on request Receipt is issued subject to the terms and conditions of the warehouseman's published schedule of charges and rules.

Central States tariff contains some language that is virtually identical to 20 other plaintiffs' tariffs. It provides in part:

> 1. All accrued charges will be billed to and collected from the party surrendering warehouse receipts. All bills are due and payable upon receipt of invoice.

(a) The company reserves and retains a continuing lien and security interest on each bale of cotton stored with the provisions of section 47-7-209 of the Uniform Commercial Code and all other applicable statutes.

The liens claimed by the warehousemen in the receipts and tariffs are based on section 7-209 of the Uniform Commercial Code of each of the states where the plaintiffs are located. That section provides:

(1) A warehouseman has a lien against the bailor of the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation (including demurrage and terminal charges), insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. If the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited and it is stated in the receipt that a lien is claimed for charges and expenses in relation to other goods, the warehouseman also has a lien against him for such charges and expenses whether or not the other goods have been delivered by the warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is

> limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.
>
> . . . . .
>
> (4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

This lien that is afforded to the warehouseman is designed to insure that the warehouseman may recover the compensation due him for his reasonable storage charges without having to resort to the courts and under applicable laws the warehouseman is entitled to refuse delivery of the stored cotton until his lien is satisfied. Thus in subsection 2 of 7-403 of the Uniform Commercial Code, the law provides: "A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests. . . ."

Likewise the United States Warehouse Act at section 262 of Title 7 U.S.C. provides:

> A warehouseman conducting a warehouse under this Act, in the absence of such lawful excuse, shall, without unnecessary delay, deliver the agricultural products stored therein upon a demand made either

by the holder of a receipt for such agricultural products or by the depositor thereof if such demand be accompanied with (a) an offer to satisfy the warehouseman's lien; . . . .

It is the contention of the plaintiff warehousemen that the language of the receipts and the tariffs taken together compels a finding that the defendant impliedly promised to pay the warehouses' accrued charges when they surrendered the receipts with the transmittal letter and the shipping instructions if the plaintiffs failed to exercise their liens. The defendant asserts that it was not the shipper nor did it surrender the receipts, but that, in any event, the tariffs are an insufficient basis as a matter of law to imply a promise from L&S, as agent of Bankers Trust, to assume liability for and to pay the accrued storage charges if the liens were lost or waived.

The parties have presented no controlling authority to the court on these issues, but the undisputed facts establish that neither Bankers Trust, nor its agent L&S, was the shipper of the cotton stored by plaintiffs. The bills of lading which accompanied the transmittal letter undisputed reflect that TJC was the shipper. The transmittal letter from L&S referred to the shipping instructions "in the name of The Julien Company." Most of the plaintiffs billed TJC for the storage charges in the earlier and routine conduct of their business. The undisputed facts establish that TJC was the shipper, not Bankers Trust, nor its agent L&S.

The same conclusion, however, cannot be reached as to whether Bankers Trust "surrendered" the warehouse receipts. Bankers Trust was the bearer and holder of these receipts. U.C.C. § 1-201. As the duly negotiated holder of these receipts it acquired by law not only the title to the cotton, but

> (a) title to the document;
>
> (b) title to the goods;
>
> (c) all rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued; and
>
> (d) the direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim by him except those arising under the terms of the document or under this Article. In the case of a delivery order the bailee's obligation accrues only upon acceptance and the obligation acquired by the holder is that the issuer and any endorser will procure the acceptance of the bailee.

U.C.C. § 7-502(1).

Of course, its rights were restricted by the loan agreement with TJC and the provisions of Article 9 of the U.C.C. but as between Bankers Trust and the warehousemen, it had the lawful authority to control the

disposition of the cotton underlying the warehouse receipts.[14] Unless it turned over or delivered the warehouse receipts to the warehouse, the cotton could not be shipped even upon the order of TJC.

Based apparently on a loan agreement or at least the course of conduct established between TJC and Bankers Trust, Bankers Trust elected to deliver those receipts to plaintiffs. Given the ordinary meaning of the word "surrender",[15] it cannot persuasively be argued that Bankers Trust did not surrender the receipts. The receipts were, as the transmittal letter provided, delivered "in trust" in order to maintain the priority of Bankers Trust's liens, but nonetheless surrendered.

Did this "surrender" constitute an implied promise by Bankers Trust to pay the accrued storage charges in light of the language of the tariffs which provides: "All accrued charges will be billed to and collected from the party surrendering warehouse receipts."? The court concludes that this language does nothing more than recognize that the warehouseman has no duty to ship the cotton until his liens

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[14] Those rights were subject to the warehousemen's liens.

[15] "To yield (something) to the possession or power of another." The American College Dictionary (1968).

have been satisfied, but even if the tariff language could be construed to mean that the person surrendering the receipt agrees to pay the accrued charges later if the warehouseman waives his lien, the law implies no such promise on the part of the surrendering party.

Under the law of warehouse receipts, the receipts issued by plaintiffs were negotiable. Negotiability is the characteristic of an instrument, in this case, a document of title, that allows it and the rights thereunder to be transferred to another without the consent of the issuer. U.C.C. § 7-501. Upon due negotiation the holder of a warehouse receipt acquires certain rights by virtue of law. U.C.C. § 7-502. These rights, being statutory in nature, are not subject to variation or consent of the issuer once the receipt has been issued; moreover, the issuer has no right to issue a negotiable warehouse receipt and at the same time to restrict the rights that attach by statute, nor to impose terms upon the bearer that limit those rights. By law the duly negotiated bearer has the right to demand the release of the cotton represented by the warehouse receipts, subject only to the warehouseman's lien.

> The bailee must deliver the goods to a person entitled under the document who complies with subsections (2) and (3), unless and to the extent that the bailee establishes any of the following:

(a) delivery of the goods to a person whose receipt was rightful as against the claimant;

(b) damage to or delay, loss or destruction of the goods for which the bailee is not liable;

(c) previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouseman's lawful termination of storage;

(d) the exercise by a seller of his right to stop delivery pursuant to the provisions of the Article on Sales . . .

(e) a diversion, reconsignment or other disposition pursuant to the provisions of this Article (§ 7-403) or tariff regulating such right;

(f) release, satisfaction or any other fact affording a personal defense against the claimant;

(g) any other lawful excuse.

(2) A person claiming goods covered by a document of title must satisfy the bailee's lien where the bailee so requests or where the bailee is prohibited by law from delivering the goods until the charges are paid.

. . . . .

(4) "Person entitled under the document" means holder in the case of a negotiable document, or the person to whom delivery is to be made by the terms or pursuant to written instructions under a nonnegotiable document.

U.C.C.§ 7-403.

The warehouseman, of course, has the right to waive its lien, and even to condition that waiver upon some third party's agreement to pay the storage charges later. Apparently the warehousemen in this case did just that -- they agreed to release the cotton without payment of their lien upon the promise of TJC to pay the storage charges later. But there was no express agreement by L&S on behalf of Bankers Trust to pay those charges and, as a matter of law, no promise to pay the storage charges can be implied from the simple exercise by defendant of its lawful right to surrender the receipts and to compel the release of the cotton underlying the warehouse receipts subject to payment of the liens, if requested.

The right to demand the release of the cotton is granted by statute; the plaintiffs' have no lawful authority to issue warehouse receipts that unilaterally condition the holder's statutory right to take possession of the cotton upon an "implied contract" to later pay accrued storage charges.

Defendant and its agent never discussed the payment of storage charges with plaintiffs prior to plaintiffs' release

of the cotton, nor did they engage in a course of prior conduct from which such a contract could be implied. The only factual basis to assert the implied contract to pay the storage charges is that the issuers of the warehouse receipts provided in a tariff which was referred to in the receipt that: "[a]ll accrued charges will be billed to and collected from the party surrendering warehouse receipts." Such a unilateral imposition upon the holders' statutory right to take possession is inconsistent with that right.

Under the applicable provisions of the Uniform Commercial Code, a holder to whom a warehouse receipt[16] has been duly negotiated acquires the obligation of the issuer to deliver the goods according to the terms of the warehouse receipt free of any claim by him "except those arising under the terms of the document or under this Article." U.C.C. § 7-502(l)(d).

Plaintiffs do not argue explicitly that the rules and regulations set out in plaintiffs' tariffs relative to payment of storage charges "arise under the terms of the document," i.e., the warehouse receipt. If this were the case, the holder of a duly negotiated warehouse receipt could be subject not only to the warehouseman's lien for reasonable

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[16] The statute actually refers to a document, but under the provisions of U.C.C. § 7-102, a document means a document of title and a document of title, under U.C.C. § 1-201, includes a warehouse receipt.

storage charges, U.C.C. § 7-209, but would also be directly liable under surrender or shipment for any charges, obligations or other claims set forth in the tariff, but not the receipt, of that particular warehouse.

Such a consequence would bring an element of uncertainty to the value of warehouse receipts, and thus weaken the negotiable viability of the document. Few merchants would be willing to pay a certain price for a document of title that carries with it unattached and not easily known financial obligations. Few lenders would be willing to lend against such uncertain value.

The court concludes that the undisputed facts of this record establish that no implied contract was created between plaintiffs and Bankers Trust on account of L&S's surrender of the warehouse receipts and Bankers Trust is not obligated to pay the accrued storage charges. The plaintiffs' motion for summary judgment is denied. At the same time, the undisputed facts in this case establish that the defendant is entitled to judgment as a matter of law for the same reasons herein discussed relative to plaintiffs' motion.

The defendant's motion for summary judgment is therefore granted and judgment shall be entered dismissing this claim on the merits.

IT IS SO ORDERED this 29th day of March, 1994.

/s/Jerome Turner
Jerome Turner
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Case Nº. 94-5582

United States Court of Appeals
for the Sixth Court

Bluebonnet Warehouse Cooperative;
Federal Compress & Warehouse Company, Inc.
Plaintiffs,

Blytheville Compress Co., Inc., et al.,
Plaintiffs - Appellants,

v.

Bankers Trust Company,
Defendant - Appellee.

Before: MERRITT, Chief Judge;
MARTIN, Circuit Judge;
SIMPSON*, Chief District Judge.

ORDER

The court having received a petition for rehearing *en banc*, and the petition having been circulated not only to the

*Hon. Charles R. Simpson, Chief United States District Judge for the Western District of Kentucky, sitting by designation.

original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing *en banc*, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Chief Judge Merritt would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX E

Case Law and Statutes:

Page No.

Bluebonnet Warehouse Co-Op.
v. Bankers Trust Co., 89 F.3d 292
(6th Cir. 1996). 77

7 USCA § 260., § 262., § 268., §269. . . 109

49 USCA § 6. 113

7 CFR 735.29
Regulations for Cotton Warehouses . . . 115

1. Warehousemen

Against person to whom negotiable warehouse receipt is duly negotiated, warehouseman's lien is limited to reasonable storage charges when none are specified on receipt. U.C.C. § 7-209(1).

2. Warehousemen

Although warehouse is not required to release bale of cotton until applicable warehousing charges relating to that bale have been paid, warehouse's lien is possessory, and thus, once cotton is released, warehouse loses its lien. United States Warehouse Act, § 18(j), 7 U.S.C.A. § 260(j); 7 C.F.R. § 735.29; U.C.C. § 7-209(1).

3. Warehousemen

Despite having legal right to refuse to ship cotton until cotton warehouses' storage charges were paid, warehouses waived their lien rights by releasing cotton and invoicing cotton merchant for charges. United States Warehouse Act, § 18(j), 7 U.S.C.A. § 260(j); 7 C.F.R. § 735.29; U.C.C. § 7-209(1).

4. Warehousemen

Warehouse receipts that cotton merchant's secured lender took possession of to perfect its security interest were duly negotiated, and thus, lender acquired both title to

warehouse receipts and title to underlying cotton when it took possession of receipts. U.C.C. §§ 7-5O1(4), 7-5O2(l).

5. Warehousemen

Cotton merchant's secured lender did not have contractual obligation to pay warehouses' storage charges for merchant's cotton even though lender took possession of warehouse receipts to perfect its security interest in cotton and even though warehouses did not forfeit contractual obligations by waiving their warehousemen's lien; there was no showing of either express agreement on lender's part or implied contract based on surrendering of receipts to warehouses by lender's agent.

6. Warehousemen

Warehouse receipt may constitute contract separate and apart from warehouseman's lien, and thus, loss of lien does not necessarily mean that warehouse loses right to compensation for services rendered, and if separate contract for payment exists, it may still be enforced despite waiving lien.

7. Assignments

When contract is assigned, there is presumption that all rights under contract are assigned and duties delegated. Restatement (Second) of Contracts § 328(1).

Charles J. Swayze, Jr. (briefed), James Y. Dale (argued), Whittington, Brock, Swayze & Dale, Greenwood, MS, for Plaintiff-Appellants.

William J. Landers (argued and briefed), Lee L. Piovarcy, Scott T. Beall, Martin, Tate, Morrow & Marston, Memphis, TN, for Defendant-Appellee.

Before: MERRITT, Chief Judge;
MARTIN, Circuit Judge; SIMPSON, Chief District Judge.*

MARTIN, J., delivered the opinion of the court, in which SIMPSON, D. J., joined. MERRITT, C.J. (pp.11-23), delivered a separate dissenting opinion.

BOYCE F. MARTIN, Jr., Circuit Judge.

* The Honorable Charles R. Simpson, III, Chief United States District Judge for the Western District of Kentucky, sitting by designation.

Blytheville Compress Co., Inc., and several other cotton warehouses appeal from a grant of summary judgment to Bankers Trust Company in their suit seeking payment of accrued storage charges for cotton. The warehouses are unsecured creditors of a now-bankrupt cotton merchant, the Julien Company. In their suit, they sought to enforce an express or implied contract between themselves and Bankers Trust, one of the Julien Company's secured lenders. The district court dismissed the action, finding that (1) no express or implied contract existed

between the warehouses and Bankers Trust, and (2) a lender holding a perfected security interest in its borrower's negotiable warehouse receipts does not become liable for its borrower's debts when acting to maintain and protect its security interest. We agree and therefore AFFIRM.

I.

Before discussing the particulars of this case, some background information about the cotton industry in general is helpful. After cotton is harvested, it is ginned and compressed into 500 pound bales before being stored in warehouses to await further transactions. Typically, when it is delivered, the warehouse issues a negotiable warehouse receipt for the cotton. These are issued to whoever deposits the cotton. Warehouses also publish "tariffs" containing a statement of their charges for storage and other such services. Generally, these are not sent to banks who lend to the cotton merchants. By statute, a warehouse storing cotton has a possessory lien against that cotton for its storage charges.

Cotton merchants, such as the Julien Company, acquire ownership of cotton by purchasing the negotiable warehouse receipts. The cotton merchant is then entitled to present the receipt to the warehouse and to take possession or ship the cotton upon satisfaction of the warehouse's statutory possessory lien. Most cotton merchants require

bank financing in order to operate.[1] In exchange for this financing, lenders usually require that the merchant's warehouse receipts be pledged and physically delivered to them. When the lender takes physical possession of the receipts, it becomes the "collateral custodian". In some cases, the lender will designate a third-party to act as its agent, a collateral sub-custodian.

II.

All of the states adopted the Uniform Warehouse Receipts Act shortly after it was promulgated. As with many of the uniform acts, however, by the late 1930s it was already outdated. Thus, in the 194Os, the National Conference of Commissioners on Uniform State Laws began drafting the Uniform Commercial Code to replace those laws enacted decades earlier. In doing so, over 1500 attorneys spent more than fifteen years piecing the U.C.C. together. No other piece of legislation or code provision ever received such scrutiny and consideration. Adopted by forty-nine states within ten years of disseminating its first

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[1] "In some situations, up to 90% of the cost of the raw cotton may be financed by borrowing against futures contracts and warehouse receipts as collateral..." *Allenberg Cotton Co., Inc. v. Pittman*, 419 U.S. 20, 27 n. 11, 95 S.Ct. 260.264 n. 11,42 L.Ed.2d 195 (1974).

draft,[2] the U.C.C. has been hailed as "the most spectacular success story in the history of American law." WHITE AND SUMMERS, UNIFORM COMMERCIAL CODE § 1 (Vol.1 at 5) (3d ed.1988). Unfortunately, in practice, Article Seven of the Code, dealing with documents of title and warehouse receipts specifically, was not successfully followed in this case.

[1,2] Under the Uniform Commercial Code, a warehouse has a possessory lien against the goods covered by a warehouse receipt for storage charges. U.C.C. § 7-209(1). Against a person to whom a negotiable warehouse receipt is duly negotiated, the warehouseman's lien is limited to reasonable storage charges where none are specified on the receipt. *Id.* The Code provides that a person claiming cotton covered by a warehouse receipt must satisfy the warehouseman's lien when the warehouse so requests. U.C.C. § 7403(2). Further, both the Code and federal Warehouse Act provide that a warehouse is not required to release a bail of cotton until applicable warehousing charges relating to that bale have been paid. U.C.C. § 7-209(1); 7 U.S.C. § 260(j); 7 C.F.R. § 735.29. However, the

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[2] The Uniform Commercial Code is law in each of the five states where the warehouses involved are located. Ark.Code Ann. § 47-209; La.Rev. Stat. Ami. § 10:7-209; Miss.Code Ann. § 75-7-209; Tenn.Code Ann. § 47-7-209; Tex. Bus. & Com.Code Ann. § 7.209. For that reason, reference in this opinion will be to the U.C.C., rather than to each state's statute.

warehouse's lien is possessory; once the cotton is released, the warehouse loses its lien.[3] "A warehouseman loses his lien on any goods which he voluntarily delivers." U.C.C. § 7-209(4). Admittedly, this is precisely what happened here.

III.

The Julien Company **was** one of the world's largest cotton merchants, buying and selling around two million bales each year. The Julien Company stored its cotton in several warehouses, including the ones before this Court. Bankers Trust, among others, financed Julien Company's cotton merchandising business; it served as collateral custodian for all of Julien Company's warehouse receipts. In turn, L & S Cotton Systems, Inc., served as Bankers Trust's collateral sub-custodian. In order to perfect its security interest in the Julien Company's warehouse receipts, Bankers Trust, through its agent L & S Cotton Systems, took possession of the receipts. U.C.C. § 9-305. Bankers Trust insists that by so doing it could exercise dominion and control over the receipts, but did not become

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[3] "[T]he specific lien arises only with respect to goods in the 'possession' of the warehouseman. If the warehouseman voluntarily delivers the goods on a promise to pay charges and the erstwhile bailor thereafter defaults, the warehouseman cannot then demand the goods and reassert his lien." White and Summers, § 21-6 (Vol. 2 at 181).

the owner of the receipts or the underlying cotton. Bankers Trust asserts that it is not itself a cotton merchant, was not a customer of the warehouses, and never directly paid any of the warehouses for Julien Company's storage charges.

[3] Each warehouse involved in this case stored the Julien Company's cotton and issued negotiable warehouse receipts representing the individual bales of cotton stored. Most of these receipts contain language stating that "[u]pon surrender of this receipt and the parent of all liens due the warehouseman, said cotton will be delivered to the bearer." Most of them also mention the tariffs as specifying charges. Many of the tariff, in turn, state that whoever surrenders the receipts will be liable for the storage charges. But, none of the warehouses sent its tariffs to Bankers Trust or its collateral sub-custodian, L & S Cotton Systems. Each warehouse did, however, release and ship the Julien Company's cotton, upon the Julien Company's request and direction, without first being paid by the Julien Company for the accrued storage charges. Because Bankers Trust had possession of the receipts, the Julien Company sent a tag list identifying the cotton and shipping documents to L & S Cotton Systems, who forwarded these along with the receipts to the warehouses. Despite having the legal right to refuse to ship the cotton until their storage charges were paid, the warehouses waived their lien rights by releasing the cotton and invoicing the Julien Company for the charges.

In January 1990, Bankers Trust and two other creditors had the Julien Company placed involuntarily in bankruptcy. At the time, the warehouses had unpaid invoices from the Julien Company dating back six months and totaling over one million dollars; no one ever contacted Bankers Trust or L & S Cotton Systems to request payment. Twenty-one of the warehouses involved here were also plaintiffs in adversary proceedings filed in the Julien Company's bankruptcy. They sought to establish a general lien against cotton still in their possession for payment of the same storage charges at issue here; They claimed that the Julien Company owned the cotton, contracted for its storage, and consequently owed the accrued charges. The warehouses' claims were unsuccessful in the bankruptcy proceedings. *Sunflower Compress v. Julien Co.*, 136 B.R. 784 (Bankr. W.D.Tenn. 1992); *Bluebonnet Warehouse Co. v. Julien Co.*, 136 B.R. 765 (Bankr. W.D.Tenn. 1992).

On May 24, 1991, while the bankruptcy proceedings were still pending, the warehouses initiated this action in the district court claiming that Bankers Trust owed the storage charges. The warehouses argued: that because Bankers Trust surrendered the warehouse receipts for shipment of the cotton, it owed the storage charges under a theory of either express or implied contract. In ruling on cross-motions for summary judgment, the district court disagreed. Bankers Trust never expressly agreed to pay the storage charges. The Court also found that, based on the

undisputed facts, there was insufficient evidence from which a jury could conclude that Bankers Trust implicitly agreed or promised to pay the storage charges upon shipment of the cotton if the warehouses failed to exercise on their liens. The court granted summary judgment in favor of Bankers Trust, from which the ware-houses now appeal. In doing so, they seek to circumvent both the specific lien provisions of the U.C.C. and the bankruptcy proceedings.

Before this Court, the warehouses maintain that express or implied contracts exist for the payment of storage charges by virtue of Bankers Trust surrendering the warehouse receipts. They assert that the bases and terms of these contracts are found in the language of the warehouse receipts and the tariffs. Bankers Trust, in turn, contends that if a warehouse waives its lien and does not collect its charges before releasing the cotton, electing instead to invoice the cotton merchant, the warehouse has simply chosen to become an unsecured creditor of the cotton merchant. Bankers Trust insists that it is not the owner of the cotton and no contract exists for the warehouses' storage charges.

IV.

[4] To begin, Bankers Trust did become the owner of both the warehouse receipts and the underlying cotton when it took possession of the receipts to perfect its security interest. All of the warehouse receipts purchased by the

Julien Company were made to "bearer." As such, they were all negotiable bearer documents of title, U.C.C. § 7-104(1)(a), and were negotiated by delivery alone. U.C.C. § 7-501(2)(a). Delivery means simply the "voluntary transfer of possession." U.C.C. § 1-201(14). Further, as documents of title, if Bankers Trust is a holder[4] to whom the warehouse receipts were "duly negotiated," it acquired both title to the documents and title to the goods. U.C.C. § 7-5O2(1). A negotiable warehouse receipt is duly negotiated when it is negotiated to a holder who purchases it in good faith without notice, and for value. U.C.C. § 7-501(4). There is no allegation that Bankers Trust took possession of the receipts without good faith or with notice. Bankers Trust's pre-existing claim constitutes value; possessing the receipts as security for previously extended credit is also in the regular course of financing. U.C.C. § 1-201(44), 7-501 n.1. Thus, the receipts were duly negotiated.

Because the warehouse receipts were bearer documents, Bankers Trust owned the cotton when it took

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[4] Bankers Trust does not dispute whether it is a holder of the warehouse receipts. Indeed, it cites cases for the proposition that a person who becomes a holder of warehouse receipts as col-lateral security does not become bound for storage charges by reason of having possession of the receipt. *Millichamp v. First National Bank*, 130 Wash. 175, 226 P. 490 (1924); *Driggs v. Dean*, 167 N.Y. 121, 60 N.E. 336, 338 (1901).

possession of them. As the title-holder, Bankers Trust was subject to the warehouseman's lien. Although to do so may have breached its agreement with the Julien Company, Bankers Trust had the legal right to surrender the receipts to the warehouses at any time and demand the cotton. The warehouses argue that Bankers Trust became contractually obligated to pay the storage charges when its agent surrendered the warehouse receipts at the Julien Company's direction.

[5,6] The question then becomes whether the warehouse receipts and tariffs may also establish a contract between the warehouses and Bankers Trust. The U.C.C. provides that, unless displaced by a specific provision, principles of law and equity shall supplement the Code. U.C.C. § 1-103. Further, the Code provides that a warehouse may insert any terms not contrary to the Code in a receipt. U.C.C. § 7-202(3). Where bailors and third parties owe storage charges, "the warehouseman has ordinary contract rights to payment enforceable in the courts by action. Under 7-209 and 7-210, such contract rights to payment may be secured by a specific lien . . . . Of course, if for some reason the warehouseman's lien . . . is lost or is ineffective, the warehouse man may still assert his contract rights." White and Summers, § 21-6 (Vol. 2 at 179-180). Thus, the warehouse receipt may constitute a contract separate and apart from the warehouseman's lien. Loss of the lien, therefore, does not necessarily mean that a warehouse loses the right to compensation for services rendered. *Jimani*

Corp. v. S.L.T. Warehouse Co., 34 U.C.C. Rep. Serv. 175, 181, 409 So.2d 496, 501 (Fla.App.1982); HAWKLAND, HOLLAND & ANZIVINO, UNIFORM COMMERCIAL CODE SERIES, § 7-209:05 (Vol. 7 at 144). Therefore, if a separate contract for payment exists, it may still be enforced despite waiving the lien.

[7] The fact that a contract may exist based on the terms of the warehouse receipts and tariffs does not end our inquiry. Were a contract to exist, for a subsequent holder of the warehouse receipt to become bound by its terms, he must assume the duties and liabilities of that contract. When a contract is assigned, there is a presumption that a" rights under the contract are assigned and duties delegated. Restatement (Second) of Contracts § 328(1). This presumption holds true, "[u]nless the language or the circumstances indicate the contrary, as in an assignment for security." *Id.* (emphasis added). An assignment as security, such as was done here when the Julien Company pledged its warehouse receipts to Bankers Trust as collateral, "does not ordinarily delegate performance to the secured party, and the secured party does not assume the assignor's duties." *Id.* comment b; *Newton v. Merchants & Farmer's Bank of Dumas*, 11 Ark. App. 167, 668 S.W.2d 51, 53 (1984). Indeed, there is no indication in the record that Bankers Trust ever intended to assume the Julien Company's duty to pay the cotton storage charges. The very purpose of the assignment--to perfect a security

interest--goes against such a presumption. *Poindexter v. National Mortgage Co.*, 1995 WL 242287, *11 (N.D. Ill. April 24, 1995).

Although a warehouseman does not forfeit contractual obligations by waiving a specific lien, we do not find that Bankers Trust has any contractual obligation to pay the storage charges for the Julien Company's cotton; there has been no showing of either an express agreement on Bankers Trust's or an implied contract based on L & S Cotton Systems surrendering the receipts to the warehouse. As the district court found, "no promise to pay the storage charges can be implied from the simple exercise by [Bankers Trust] of its lawful right to surrender the receipts and to compel the release of the cotton underlying the warehouse receipts subject to payment of the liens, if requested. No such request was made. The warehouses released the cotton, waived their specific lien, and now seek to create a contract where none was intended to recoup their lost storage charges. The Uniform Commercial Code intended that warehouses retain possession of stored goods until the warehouses' lien is satisfied and gives them the legal right to do so. Unfortunately, the warehouses in this case did not enforce their liens. Moreover, they did not even release the cotton on condition of payment by a third party, Bankers Trust, but simply invoiced the cotton merchant. Bankers Trust is therefore not legally obligated to pay the warehouses storage charges.

Judgment AFFIRMED.

MERRITT, Chief Judge, dissenting.

The Court has concluded that Bankers Trust in not liable to the warehouses for storage charges under any contract theory. Even if this were correct, and I have my reservations as to that proposition, the Court has failed to consider the argument of the warehouses that the summary judgment papers establish a valid common law claim in restitution for unjust enrichment of Bankers Trust at their expense. This claim, referred to below as a claim for breach of "implied contract," was hazy and ill-formed at the trial level. The court below failed to mention or deal with it in its opinion. In its original appellate brief the warehouses at page 28 referred briefly to it as a claim that Bankers Trust "benefitted unjustly from these actions and in fact has been unjustly enriched by its own wrongful actions." At oral argument the Court recognized that the warehouses were trying, however unartfully, to describe a claim in restitution and asked that the parties file supplemental briefs of this theory of liability. The parties, including two *amici* representing large banking institutions, have now filed supplemental briefs on this point because I believe that the court below should be reversed, and that this case should be tried under a theory of restitution, I respectfully dissent.

If in a case such as this, as the majority has concluded, an express contract does not exist, a court should follow common law doctrines of restitution, sometimes referred to as "implied contract", "quasi-contract," "quantum meruit," or "unjust enrichment," to insure in certain circumstances that a party who has conferred a benefit on another is allowed to recoup its costs. These common principles of restitution, by whatever name, are now well accepted in the law, as Dean John W. Wade elaborated in a seminal article collecting cases thirty years ago:

> The principle is now fully recognized in this country that a "person who has been unjustly enriched at the expense of another is required to make restitution to the other." This is the language of the first section of the Restatement of Restitution. When one person confers a benefit upon another without the latter's solicitation, the benefit received constitutes an enrichment--a windfall, so to speak. This benefit may take one of several forms. It may involve (1) transferring property to the defendant, (2) saving, preserving or improving his property, (3) rendering personal services for him, or (4) performing for him a duty imposed directly by law or by his own contractual arrangements.

John W. Wade, *Restitution for Benefits Conferred Without Request*, 19 Vand. L.Rev. 1183 (1966).

Bankers Trust, as defendant, and the Commercial Finance Association and the New York Clearing House, as *Amici Curiae* on behalf of a large number of large banks, have argued in several different way one basic proposition: A secured creditor (a bank) should never be liable in restitution for benefits voluntarily conferred on it by an unsecured creditor (a warehouse or other supplier of goods and services). They argue that lending institutions should be exempt from the doctrine of unjust enrichment cause otherwise equitable principles might upset the limited liability intended for banks under the U.C.C. The basic thrust of this categorical argument for the exemption of banks is concisely stated in the brief of the New York Clearing House at page 4:

> Disruption of the clear rules of the UCG [by application of principles of restitution] would undermine a commercial lender's ability to predict whether and to what extent it can obtain repayment of its loans. This uncertainty in turn would increase financing costs and, in some cases, lead to an unwillingness to provide financing to manufacturers and merchants.

There are several problems with this argument. *First* even if it could be said some how that *secured creditors* are a special class that generally speaking should be exempt from the law of restitution, that characterization

does not accurately describe the Bank's transactions here. The Bank took complete title to the cotton with power to exercise control over it, and it fully exercised such control knowing that the warehouses expect-ed payment for storage. The Bank was the owner of the cotton, and it should be treated as any other bailor of goods that are served by the bailee at a significant cost. The banks have cited no case in which a lending institution became the owner of goods, as here, and was exempt from the normal principles of restitution. The reason there is no case so holding is that the Rule of Law would be undermined by an exemption for banks from the principles of fair dealing that all other institutions and individuals must observe. There is no reason to exempt the most powerful institutions in our society from laws that ordinary people must obey.

Second, the banks are wrong in asserting that this decision would undermine a lender's ability to predict recovery value on its loans. When Bankers Trust issued loans to the Julien Company, secured in part by warehouse receipts for cotton, the Bank knew that the warehouse receipts were worth only the value of the cotton minus any storage charges that would have to be paid before the cotton was released. The Julien Company's bankruptcy has to this point given the bank a windfall for the amount of the storage charges, an amount that no reasonable lender would have expected to collect at the time the loan was issued.

Finally, and most importantly, the argument that recovery on a restitution theory is never available in a case governed by the Uniform Commercial Code belies the explicit language of the Code. Section 1-103 states:

> Unless displaced by the particular provisions of chapters 1-9 of this title, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Tenn.Code Ann. § 47-1-103 (1992). Thus, the warehouses in the present case are not barred from proceeding on a theory of unjust enrichment unless a particular Code provision explicitly displaces that equitable remedy. *See id.* cmt. 1 (stating that "this section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are *explicitly* displaced by this Act") (emphasis added). The theory of § 1-103 is contrary to the Bank's categorical contention that the warehouses as unsecured creditors must necessarily subsidize the Bank as a secured creditor by preserving its collateral without restitution.

Although a large number of commercial legal principles have been displaced by specific U.C.C. provisions, the rules of equity have not been so thoroughly

subsumed by the Code. This is due to the distinct nature of legal and equitable rules and the effect of codification upon them. A primary function of any codification of common law, including the Code, is to displace prior *legal* rules. The same cannot be said of prior *equitable* principles. Equity was developed to do justice in individual cases by carving exceptions to and otherwise modifying legal rules. Thus, a codification of legal rules does not automatically displace the equitable principles which supplement them. See the extensive discussion of this point in 1 James J. White and Robert S. Summers, *Uniform Commercial Code* § 5 at 19-20 (3d pract. ed.1988) and Robert S. Summers, *Equitable Principles Under Section 1-103 of the Commercial Code,* 72 Nw. U.L.Rev. 906, 908-13 (1978). See also the discussion of the equitable rights of the unsecured creditor versus the secured creditor from a law and economics perspective in Lynn M. Lopucki, *The Unsecured Creditor's Bargain*, 80 Va.L.Rev. 1887 (1994).

Bankers Trust argues that U.C.C. section 7-5O2 specifically displaces the warehouses' unjust enrichment claim. That section lists the rights acquired by a holder to whom a warehouse receipt has been duly negotiated, and states that such a holder receives, in addition to title to the document and title to the goods, "the direct obligation of the issuer to hold or deliver the goods according to the terms of the document *free of any defense or claim by him* except those arising under the terms of the document or

under this chapter." Tenn.Code Ann. § 47-7602(d) (emphasis added). Because neither the warehouse receipt nor Article 7 specifically grants equitable remedies to the warehouses, the Bank argues that it should receive the cotton free of any such claim. However, section 7-502 must be read in conjunction with section 7-210. The latter provision, which explains the workings of the warehouseman's lien, clearly states that the lien is not a warehouse's exclusive avenue of recovery from a receipt holder, but rather is a right "in addition to all other rights allowed by law to a creditor against his debtor." Tenn.Code Ann. § 47-7-210(7). Thus, Article 7 does not displace equitable remedies for warehouses against receipt holders; instead, and in harmony with the general directive of 1-103, it explicitly acknowledges that non-Code remedies can be employed.

Bankers Trust also makes the more general assertion that equitable claims, and specifically claims for unjust enrichment, should not be cognisable in cases in which they might produce results at odds with the priority system established in Article 9. The bank claims that this is a "majority rule" and cites several cases which may support this broad proposition. It is true that in *Peerless Packing Co. v. Malone & Hyde, Inc.*, 180 W.Va. 267, 376 S.E.2d 161 (1988), the secured creditor of a grocer's inventory was allowed to prevail over unsecured creditors who claimed unjust enrichment for groceries delivered to an insolvent

debtor. Also, in *Evans Products Co. v. Jorgensen,* 245 Or. 362, 421 P.2d 978, 983 (1966), the court said that "[t]he purpose and effectiveness of the UCC would be substantially impaired if interests created in compliance with UCC procedures could be defeated by application of the equitable doctrine of unjust enrichment." I am not persuaded by these cases, which ignore the clear command of section 1-103 that equitable principles will apply unless specifically displaced. A secured creditor will not always be unjustly enriched by actions of an unsecured creditor that increase the value of the secured party's collateral, but the Code does not categorically reject the possibility that a secured lender could be unjustly enriched and forced to make restitution on that account. The contrary view of other state courts is much more consistent with the code and a system of fair dealing by banks, *see e.g., Ninth District Production Credit Ass'n v. Ed Duggan, Inc.*, 821 P.2d 788 (Colo.1991); *Producers Cotton Oil Co. v. Amstar Corp.*, 197 Cal.App.3d 638, 242 Cal.Rptr. 914 (1988).

Application of the Law of Unjust Enrichment to this Case

Under Tennessee law,[1] recovery for unjust enrichment[2] is allowed where: 1) plaintiff confers a benefit upon defendant; 2) defendant appreciates the benefit; 3) defendant accepts the benefit; and, most importantly, 4) it would be inequitable for defendant to retain the benefit without paying for it.

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[1] Though many of the warehouses involved in this case are not situated within Tennessee, there has been no suggestion by any of the parties that any law other than Tennessee's should apply. The Julien Company's cotton transactions occurred in Tennessee, as did its transfer of the warehouse receipts.

[2] The Tennessee Supreme Court has recognized that "[a]ctions brought upon theories of unjust enrichment, quasi contract, contracts implied in law, and quantum meruit are essentially the same," and that courts use each of these various names to "describe that class of implied obligations where, on the basis of justice and equity, the law will impose a contractual relationship between parties, regardless of their assent thereto." *Paschall's Inc. v. J.P. Dozier*, 219 Tenn. 45. 407 S.W.2d 150, 154 (1966). *Paschall's Inc. v. J.P. Dozier*, 219 Tenn. 45, 407 S.W.2d 150,155 (1966).

A more specific form of this rule, directly applicable to the circumstances of this case, is found in section 117 of the Restatement of Restitution, which outlines the principles of liability when one's property or credit is preserved by another. No categorical exemption is given to banks as secured creditors:

> **§ 117. Preservation of Another's Things or Credit.**
>
> (1) A person who, although acting without the other's knowledge or consent, has preserved things belonging to another from damage or destruction, is entitled to restitution for services rendered or expenditures incurred therein, if . . .
>
> > (a) he was in lawful possession or custody of the things or if he lawfully took possession thereof, and the services or expenses were not made necessary by his breach of duty to the other, and
> >
> > (b) it was reasonably necessary that the services should be rendered or the expenditures incurred before it was possible to communicate with the owner by reasonable means, and
> >
> > (c) he had no reason to believe that the owner did not desire him so to act, and

(d) he intended to charge for such services or to retain the things as his own if the identity of the owner were not discovered or if the owner should disclaim, and

(e) the things have been accepted by the owner.

Restatement of Restitution § 117(1) (1937).

It is hornbook law that the courts will not imply a contract between parties where an express contract already exists. *Jaffe v. Bolton* 817 S.W.2.d 19, 26 (Tenn.Ct.App.1991). Because the Court has decided that no express contract existed between Bankers Trust and the warehouses, this rule would not be a barrier to finding an implied contract in the present case. However, a related rule exists, which Bankers Trust has argued is applicable here:

> A person who has conferred a benefit upon another as the performance of a con-tract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person.

Restatement of Restitution § 110 (1937) ("Restitution From Beneficiary of a Contract with Third Person Who Has Failed to Perform"). Section 110 finds expression in Tennessee law in the rule that "an implied undertaking cannot arise against one benefited by the work performed, where

the work is done under a special contract with another." *Paschall's*, 407 S.W.2d at 154. An important caveat, however, is that this "general rule" is not applicable in those cases where the express "contract becomes unenforceable or invalid." *Id.* at 154-55.

Paschall's is instructive. The case involved an action by a contractor to recover for materials and labor furnished in the construction of an addition to a house. The addition was performed under contract with the daughter of the homeowner. The contractor, unable to recover from the daughter, sued the homeowner/parent on a theory of unjust enrichment, and the Tennessee Supreme Court remanded the case to the trier of facts to allow this theory to proceed. In *Paschall's*, as here, the plaintiff had lost its right to recover under a statutorily granted lien. 407 S.W.2d at 152. The court held that this did not preclude an unjust enrichment recovery. *Id.* at 153. Additionally, the existence of an express contract between the plaintiff and the daughter did not bar the possibility of an equitable remedy where the contract became unenforceable due to the daughter's bankruptcy. *Id.* at 152, 154-55. In the present case, the warehouses have been unable to recover from the bankrupt Julien Company. Thus, the fact that Bankers Trust may have been a third-party beneficiary of a now-unenforceable contract between the warehouses and the Julien Company does not preclude the warehouses from raising an unjust enrichment claim against the bank.

A final argument made by Bankers Trust against the employment of equitable remedies against it by the warehouses is that it was not the owner of the cotton and, therefore, any benefit It received was only an indirect benefit, identical in nature to that received by any secured creditor due to an unsecured creditor's preservation or enhancement of the secured party's collateral. This argument is misplaced for two reasons. First, Bankers Trust was, as a holder of negotiable warehouse receipts for the cotton, the owner of the cotton under Article 7. *See* Tenn.Code Ann. § 47-7402 ("a holder to whom a negotiable document of title has been duly negotiated. . . title to the goods"). Additionally, title to the goods does, not appear to be a necessary element of unjust enrichment under Tennessee law. The correct question is whether Bankers Trust had a benefit conferred upon it by the warehouses, see *Paschall's*, 407 S.W.2d at 155, and this is a question for the finder of fact.

Because the U.C.C. does not bar the warehouses' "implied contract" or restitution claim against Bankers Trust, on this appeal from summary judgment, the proper inquiry for this Court should be whether a reasonable finder of fact could conclude that the facts, when taken in the light most favorable to the warehouses, would allow recovery under a theory of unjust enrichment. It is clear that a finder of fact could so conclude, under the theory of unjust enrichment given in *Paschall's* or, more specifically, in

section 117 of the Restatement of Restitution. Section 117 is particularly helpful because, rather than simply stating that the most important factor for a restitutionary recovery is whether the enrichment at issue was unjust, it gives specific standards for determine when the preservation of another's things should be compensable.

The facts in the appellate record suggest that: The warehouses, in lawful possession of the cotton, acted to store and preserve the cotton for the benefit of the Bank as owner of the cotton without the express consent of the Bank. The benefit was not forced on the Bank against its will. When the Bank ceased taking warehouse receipts and funding the Julien Company, and then placed it into involuntary bankruptcy, it was well aware that the warehouse charges were unpaid and that it had accepted the benefit of their storage services. The benefits were conferred on the Bank before the warehouses received letters of notification that the Bank had become the owner of the cotton through transfer of the warehouse receipts by the Julien Company to the Bank. The warehouses had no reason to believe that the owner of the cotton did not want the warehouses to preserve the cotton from loss or damage. The warehouses intended to charge a storage fee for their services, and the Bank as owner acknowledged and accepted ownership of the cotton. In each instance before shipment of the cotton, the Bank established a commercial relationship with the warehouse. Each time it wrote a

letter to the warehouse giving the shipping instruction and saying that "the documents [warehouse receipts showing ownership in the Bank, bills of lading, and shipping instructions] were at all times to be held and handled by you in trust for our account." The Bank as owner had complete control over the warehouse receipts and hence complete control of the cotton. The Bank, as owner of the cotton, directly and knowingly requested by letter and used the services of the warehouses. Thereafter, the Bank accepted the proceeds for the sale of the cotton which the warehouses had preserved.

A finder of fact, based on the above alleged facts, could conclude that Bankers Trust was unjustly enriched by the warehouses for the value of the storage costs not paid by the Julien Company. The fact finder would not have to find unjust enrichment. Although the Court has held that the warehouse receipts made the Bank the owner of the cotton, in deciding whether the enrichment was unjust, the finder of fact should consider, and right credit, the Bank's claim that at all times it acted only as a normal secured creditor. In this regard it should be noted that, had the bank physically held the cotton as collateral, it would have incurred storage costs as a part of its independent duty under the U.C.C. to use "reasonable care in the custody and preservation of collateral in [itsl possession." Tenn.Code Ann. § 47-9-2O7(1). See *Knox v. Phoenix Leasing*, 29 Cal. App.4th 1357, 35 Cal.Rptr.2d 141, 148 (1994); (citing § 9-217 and stating that, where collateral is perishable, "the

unsecured status of the creditor appears less important than the fact that the secured creditor directly benefits from expenditures the creditor is spared having to make on its own behalf"). Also important to the question of unjust enrichment would be whether it was a reasonable custom of the cotton marketplace for warehouses to waive the statutorily-granted liens that would have allowed them to collect, storage costs before releasing the cotton.

The precise scope of inquiry that a finder of fact should undertake in a case such as this is highlighted by reference to the source of disagreement between the majority and dissenting justices in Ninth District *Production Credit Ass'n v. Ed Duggan, Inc.*, 821 P.2d 788 (Colo.1991). In Duggan an unsecured supplier of corn to a feed lot brought an unjust enrichment claim against a secured creditor who held a properly perfected security interest in the feed lot's assets. The, Supreme Court of Colorado, sitting *en banc* agreed with the trial and intermediate appellate courts that an unjust enrichment claim was not automatically precluded by the secured creditor's possession of an interest given priority under the Uniform Commercial Code. The court articulated a standard: "Where a secured creditor is benefitted by a transaction between its debtor and an secured creditor that enhances the value of the secured collateral, and the secured creditor initiates or encourages the transaction, the secured creditor can be held liable to the unsecured creditor on the theory of unjust enrichment. *Id.*

at 801. The court reversed and remanded the case to clarify that: 1) the secured creditor must initiate or encourage the transaction in order for the enrichment to be unjust, and 2) the jury instructions should explain the interrelation of the doctrine of unjust enrichment and Article 9 of the U.C.C. The dissent claimed that the majority's standard imposed requirements not otherwise found in the law of equity, and that the U.C.C. status of the parties was irrelevant to the case. *Id.* at 804 & n. 7. Both the majority and dissent make good points, but neither is entirely correct as r understand the law of implied contract.[3]

I disagree with "*Duggan* majority's contention that a secured party must "initiate or encourage the transaction" before an secured creditor can ever recover on a theory of unjust enrichment. As conceded in *Duggan* itself, acquiescence by the secured creditor might be enough if the unsecured creditor's actions were necessary to preserve the secured collateral. 821 P.2d at 797 n. 7 (citing *Producers Cotton Oil Co. v. Amstar Corp.*, 197 Cal.App.3d 638, 242 Cal.Rptr. 914 (1988)). Also, the "initiate or encourage" element is contrary to Restatement of Restitution § 117, which does not require the party benefited to have initiated or encouraged the transaction. I agree with the *Duggan* majority, however, that the finder of fact should be informed of the U.C.C. status of the parties as a factor in deciding whether a secured party's retention of a benefit conferred by an unsecured party would be inequitable. The

dissent's position that a party's status as a secured creditor is "not relevant" to whether an implied contract exists would not give the finder of fact the information with which to judge the true inequity of a transaction.

The District Court was therefore in error in this diversity case in granting summary judgment to the Bank on the restitution or implied contract claims of the warehouses. Based on *Paschall's* and other restitution cases, Tennessee courts would apply the principles of § 117 of the Restatement of Restitution, which preclude summary judgment and require submission of the claim to the fact finder for resolution.

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[3] Some confusion may be based on the difference between a contract implied in fact and one implied in law. A contract implied in fact is akin to an express contract; it is based on a tacit, rather than a stated or written, agreement between the parties, and ordinary rules of contract law apply. Contracts implied in law are creations of equity and are not based upon the *intention of the parties to contract.* See *Paschall's,* 407 S.W.2d at 154. Still the intentions of the parties and the overall background of the transaction can be important to die determination of whether the enrichment alleged in an implied contract claim is unjust.

§ 260. Contents of receipts

Every receipt issued for agricultural products stored in a warehouse licensed under this chapter shall embody within its written or printed terms (a) the location of the warehouse in which the agricultural products are stored; (b) the date of issue of the receipt; (c) the consecutive number of the receipt; (d) a statement whether the agricultural products received will be delivered to the bearer to a specified person, or to a specified person or his order; (e) the rate of storage charges; (f) a description of the agricultural products received, showing the quantity thereof, or, in case of agricultural products customarily put up in bales or packages a description of such bales or packages by marks, numbers or other means of identification and the weight of such bales or packages; (g) the grade or other class of the agricultural products received and the standard or description in accordance with which such classification has been made: *Provided*, That such grade or other class shall be stated according to the official standard of the United States applicable to such agricultural products as the same may be fixed and promulgated under authority of law: *Provided further*, That until such official standards of the United States for any agricultural product or products have been fixed and promulgated, the grade or other class thereof may be stated in accordance with any recognized standard

or in accordance with such rules and regulations not inconsistent herewith as may be prescribed by the Secretary of Agriculture; (h) a statement that the receipt is issued subject to this chapter and the rules and regulations prescribed thereunder; (i) if the receipt be issued for agricultural products of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership; (j) a statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien: *Provided*, That if the precise amount of such advances made or of such liabilities incurred be at the time of the issue of the receipt unknown to the warehouseman or his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof shall be sufficient; (k) such other terms and conditions within the limitations of this chapter as may be required by the Secretary of Agriculture; and (l) the signature of the warehouseman, which may be made by his authorized agent: *Provided*, That unless otherwise required by the law of the State in which the warehouse is located, when requested by the depositor of other than fungible agricultural products, a receipt omitting compliance with subdivision (g) of this section may be issued: *Provided, however*, That the Secretary of Agriculture may in his discretion require that such receipt have plainly and conspicuously embodied in its written or printed terms a provision that such receipt is not negotiable.

Aug. 11, 1916, c. 313, Pt. C, § 18, 89 Stat. 488; July 24, 1919, c. 26, 41 Stat. 266; Feb.23, 1923, c. 106, 42 Stat. 1284.

7 USCA

§ 262. Delivery of products stored on demand; conditions to delivery

A warehouseman conducting a warehouse licensed under this chapter, in the absence of some lawful excuse, shall, without unnecessary delay, deliver the agricultural products stored therein upon a demand made either by the holder of a receipt for such agricultural products or by the depositor thereof if such demand be accompanied with (a) an offer to satisfy the warehouseman's lien; (b) an offer to surrender the receipt, if negotiable, with such indorsements as would be necessary for the negotiation of the receipt; and (c) a readiness and willingness to sign, when the products are delivered, an acknowledgment that they have been delivered if such signature is requested by the warehouseman.

Aug.11, 1916, c. 313, Pt. C. § 21, 39 Stat. 489.

1 USCA

§ 268. Rules and regulations

The Secretary of Agriculture shall from time to time make such rules and regulations as he may deem necessary for the efficient execution of the provisions of this chapter.

Aug.11, 1916, c. 313, Pt. C, § 28, 89 Stat. 490.

§ 269. Cooperation with State authorities; authority of Secretary; operation of existing laws

In the discretion of the Secretary of Agriculture he is authorized to cooperate with State officials charged with the enforcement of State laws relating to warehouses, warehousemen, weighers, graders, inspectors, samplers, or classifiers; but the power, jurisdiction, and authority conferred upon the Secretary of Agriculture under this chapter shall be exclusive with respect to all persons securing a license hereunder so long as said license remains in effect. This chapter shall not be construed so as to limit the operation of any statute of the United States relating to warehouses or to warehousemen, weighers, graders, inspectors, samplers, or classifiers now in force in the District of Columbia or in any Territory or other place under the exclusive jurisdiction of the United States.

Aug.11, 1916, c. 313, Pt. C, § 29, 39 Stat. 490; Feb. 23, 1923, c. 106, 42 Stat. 1285; Mar. 2, 1931, c. 366, § 9, 46 Stat. 1465.

§ 6. Schedules and statements of rates, etc., joint rail and water transportation.

Schedule of rates, fares, and charges; filing and posting

(1) Every common carrier subject to the provisions of this chapter shall file with the Commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such

schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

REGULATIONS FOR COTTON WAREHOUSES

7 CFR 735.29

A licensed warehouseman shall not make any unreasonable, exorbitant, or discriminatory charge for services rendered. Before a license to conduct a warehouse is granted under the act, the warehousemen shall file with the Department a copy of his rules, if any, and a schedule of the charges to be made by him if licensed. . . .At or before the beginning of each season, every licensed warehouseman shall file with the Department a copy of his rules, if any, and of his schedule of charges for the ensuing season. . . .Each licensed warehouseman shall keep a copy of his current rules and schedule of charges exposed conspicuously in the place prescribed by § 735.6 and at such other place accessible to the public as the Secretary or his designated representative may from time to time designate. . . .

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BLUEBONNET WAREHOUSING CORPORATION; BLYTHEVILLE COMPRESS CO., INC.; CENTRAL STATES COTTON CO.; D.B. GRIFFIN WAREHOUSE, INC.; DEER CREEK COMPRESS COMPANY d/b/a ROLLING FORK COMPRESS AND WAREHOUSE; DELTA COOP COMPRESS & WAREHOUSE; DUNAVANT ENTERPRISES, INC.; FEDERAL COMPRESS & WAREHOUSE COMPANY, INC.; FRANKLIN COTTON WAREHOUSE COOPERATIVE, INC.; FST, INC. d/b/a NATIONAL COMPRESS WAREHOUSE; GREENVILLE COMPRESS COMPANY; GULF COMPRESS; HARLINGEN COMPRESS COMPANY, INC.; HOLMES GIN, INC., d/b/a HOLMES BONDED WAREHOUSE; LEVELLAND COMPRESS CO., INC.; NATIONAL DIVERSIFIED CO., d/b/a BALLINGER COMPRESS CO., HAMLIN COMPRESS CO., RULE COMPRESS CO., AND SAN ANGELO COTTON WAREHOUSE CO.; NORTH PLAINS COMPRESS, A PARTNERSHIP; PLAINVIEW COOPERATIVE COMPRESS, INC.; PATE GRAIN COMPANY, d/b/a POSTEX WAREHOUSE COMPANY, A PARTNERSHIP; PORT OF CORPUS CHRISTI AUTHORITY OF NUECES COUNTY, TEXAS DOCKSIDE WAREHOUSE AND COTTON COMPRESS, d/b/a CORPUS CHRISTI PUBLIC COMPRESS; RAYVILLE COMPRESS & WAREHOUSE COOPERATIVE, d/b/a TALLULAH COMPRESS & WAREHOUSE AND RAYVILLE COMPRESS WAREHOUSE; SOUTHERN COMPRESS COMPANY; SOUTHERN COMPRESS & WAREHOUSE COMPANY; STAPLE COTTON COOPERATIVE ASSOCIATION, d/b/a STAPLCOTN COMPRESS WAREHOUSE; SUNFLOWER COMPRESS COMPANY; SWEDEN WAREHOUSE COMPANY, INC.; SWEET JET OIL CO. TRUST, TRUSTEE JACK POE, d/b/a TRI-COUNTY WAREHOUSE COMPANY; SWEETWATER COMPRESS, INC.; TENSAS WAREHOUSE, INC.; TEXAS COMPRESS & WAREHOUSE CORPORATION, d/b/a STAMFORD COMPRESS & BONDED WAREHOUSE, SEYMOUR COMPRESS & BONDED WAREHOUSE, COLORADO COMPRESS & BONDED WAREHOUSE AND HASKELL CO. WAREHOUSE & COMPRESS CO.; THE TRINITY COMPANY; TUNICA COMPRESS & WAREHOUSE COMPANY; VALLEY COMPRESS COMPANY, INC.; UNION SERVICE INDUSTRIES, INC., d/b/a UNION COMPRESS WAREHOUSE OF ALABAMA, UNION COMPRESS

WAREHOUSE OF LOUISIANA AT WINNSBORO AND UNION COMPRESS WAREHOUSE OF LOUISIANA AT FERRIDAY; AND WEST TEXAS INDUSTRIES, INC.

PLAINTIFFS

vs. **CIVIL ACTION NO. 91-2399-TUB**

BANKERS TRUST COMPANY, A MEMBER OF BANKERS TRUST OF NEW YORK CORPORATION, A CORPORATION

DEFENDANT

THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

COME NOW, Bluebonnet Warehousing Corporation; Blytheville Compress Co., Inc.; Central States Cotton Co.; D. B. Griffin Warehouse, Inc.; Deer Creek Compress Company, d/b/a Rolling Fork Compress and Warehouse; Delta Coop Compress & Warehouse; Dunavant Enterprises, Inc.; Federal Compress & Warehouse Company, Inc.; Franklin Cotton Warehouse Cooperative, Inc.; FST, Inc., d/b/a National Compress Warehouse; Greenville Compress Company; Gulf Compress; Harlingen Compress Company,

Inc.; Holmes Gin, Inc., d/b/a Holmes Bonded Warehouse; Levelland Compress Co., Inc.; National Diversified Co., d/b/a Ballinger Compress Co., Hamlin Compress Co., Rule Compress Co., and San Angelo Cotton Warehouse Co.; North Plains Compress; Plainview Cooperative Compress, Inc.; Pate Grain Company, d/b/a Postex Warehouse Company; Port of Corpus Christi Authority of Nueces County, Texas Dockside Warehouse and Cotton Compress, d/b/a Corpus Christi Public Compress; Rayville Compress & Warehouse Cooperative, d/b/a Tallulah Compress & Warehouse and Rayville Compress Warehouse; Southern Compress Company; Southern Compress & Warehouse Company; Staple Cotton Cooperative Association, d/b/a Staplcotn Compress Warehouse; Sunflower Compress Company; Sweden Warehouse Company, Inc.; Sweet Jet Oil Co. Trust, Trustee Jack Poe, d/b/a Tri-County Warehouse Company; Sweetwater Compress, Inc.; Tensas Warehouse, Inc.; Texas Compress & Warehouse Corporation, d/b/a Stamford Compress & Bonded Warehouse, Seymour Compress & Bonded Warehouse, Colorado Compress & Bonded Warehouse and Haskell Co. Warehouse & Compress Co.; The Trinity Company; Tunica Compress & Warehouse Company; Valley Compress Company, Inc.; Union Service Industries, Inc., d/b/a Union Compress Warehouse of Alabama, Union Compress Warehouse of Louisiana at Winnsboro, and Union Compress Warehouse of Louisiana at Ferriday; and West Texas Industries, Inc., by counsel, and file this their

Complaint against Bankers Trust Company, a member of Bankers Trust of New York Corporation, a corporation, and would show unto the Court the following facts, to-wit:

I. PARTIES

1. Bluebonnet Warehousing Corporation is incorporated in the state of Texas with a principal place of business at 11311 North Central Expressway, Suite 218, Dallas, TX 75243; Blytheville Compress Co., Inc. is incorporated in the state of Arkansas with a principal place of business at 700 North Broadway, Blytheville, AR 72315; Central States Cotton Company is incorporated in the state of Tennessee with a principal place of business at 3797 New Getwell Road, Memphis, TN 38118; D. B. Griffin Warehouse, Inc. is incorporated in the state of Arkansas with a principal place of business at Main Street, Elaine, AR 72333; Deer Creek Compress is incorporated in the state of Mississippi with a principal place of business at Hwy 61 South, Rolling Fork, MS 39159; Delta Coop Compress & Warehouse is incorporated in the state of Texas with a principal place of business at Plainview, TX 79072; Dunavant Enterprises, Inc. is incorporated in the state of Tennessee with a principal place of business at 3797 New Getwell Road, Memphis, TN 38118; Federal Compress & Warehouse Company, Inc. is incorporated in the state of Delaware with a principal place of business at 165 Madison Avenue,

Memphis, TN 38103; Franklin Cotton Warehouse Cooperative is incorporated in the state of Louisiana with a principal place of business at Hwy 15 North, Industrial Park, Winnsboro, LA 71295; FST, Inc., d/b/a National Compress Warehouse, is incorporated in the state of Mississippi with a principal place of business at Hwy 49 West, Drew, MS 38737; Greenville Compress Company is incorporated in the state of Mississippi with a principal place of business at 1200 Old Leland Road, Greenville, MS 38701; Gulf Compress is incorporated in the state of Texas with a principal place of business at Corpus Christi, TX 78403; Harlingen Compress Company, Inc. is incorporated in the state of Texas with a principal place of business at 2201 North Commerce, Harlingen, TX 78551; Holmes Gin, Inc., d/b/a Holmes Bonded Warehouse, is incorporated in the state of Mississippi with a principal place of business at Holmes Warehouse Road, Tchula, MS 39169; Levelland Compress Co., Inc. is incorporated in the state of Texas with a principal place of business at 500 Maple Street, Levelland , TX 79336; National Diversified Company, d/b/a Ballinger Compress Co., Hamlin Compress Co., Rule Compress Co., and San Angelo Cotton Warehouse Co., is incorporated in the state of Texas with a principal place of business at 1700 North Village Mills Drive, Waco, TX 76710; North Plains Compress, d/b/a North Plains Compress Co. and North Plains Gins, Inc., is a Texas partnership, its partners are North Plains Compress Co. which is incorporated in the state of Texas with a principal place of

business at 1203 S. W. Second Street, Tulia, TX 79088 and North Plains Gins, Inc. which is incorporated in the state of Texas with a principal place of business at 1203 S.W. Second Street, Tulia, TX 89088, said addresses being the state of citizenship of each partner, said partnership's principal place of business at 1203 S.W. Second Street, Tulia, TX 89088; Plainview Cooperative Compress, Inc. is incorporated in the state of Texas with a principal place of business at Hwy 70 East, Plainview, TX 79072; Pate Grain Company, d/b/a Postex Warehouse Company, is a partnership which partners are Joe B. Pate, Jr. 4710 67th Street, Lubbock, TX 79414, Joe B. Pate, Sr., 2318 56th Street, Lubbock, TX 79412, and Doris and Roy Mathews, 1750 Wright Street, Sacramento, CA 95825, said addresses being the state of citizenship of each partner, said partnership's principal place of business at 4710 67th Street, Lubbock, TX 79414; Port of Corpus Christi Authority of Nueces County, Texas Dockside Warehouse and Cotton Compress, d/b/a Corpus Christi Public Compress, is a political subdivision of the state of Texas pursuant to Article 3, Section 52 of the state constitution with a principal place of business at Corpus Christi, TX 78403; Rayville Compress & Warehouse Cooperative, d/b/a Tallulah Compress & Warehouse and Rayville Compress Warehouse, is a co-operative association organized under the laws of the state of Louisiana with a principal place of business at 117 Center Street, Rayville, LA 71269; Southern Compress Company is incorporated in the state of Arkansas with a

principal place of business at 1600 East Gregory, North Little Rock, AR 72114; Staple Cotton Cooperative Association, d/b/a Staplcotn Compress Warehouse, is a non-stock incorporated cooperative incorporated in the state of Tennessee and operating under the cooperative laws of the state of Mississippi with a principal place of business at 214 West Market, Greenwood, MS 38930; Sunflower Compress Company is incorporated in the state of Mississippi with a principal place of business at 400 B. B. King Road, Indianola, MS 38751; Sweden Warehouse Company, Inc. is incorporated in the state of Arkansas with a principal place of business at Rt. 1, Box 314, Altheimer, AR 72004; Sweet Jet Oil Co. Trust, Trustee Jack Poe, d/b/a Tn-County Warehouse Company, has a domicile and principal place of business for said Trust and Trustee at 2800 A Street, Snyder, TX 79549; Sweetwater Compress, Inc. is incorporated in the state of Texas with a principal place of business at 100 Sam Houston Street, Sweetwater, TX 79556; Tensas Warehouse, Inc. is incorporated in the state of Louisiana with a principal place of business at Plank Road, St. Joseph, LA 71366; The Trinity Company is incorporated in the state of Texas with a principal place of business at 5801 16th Street, Lubbock, TX 79416; Tunica Compress & Warehouse Company is incorporated in the state of Mississippi with a principal place of business at 501 Harris Street, Tunica, MS 38676; Union Service Industries, Inc. is incorporated in the state of Delaware with a principal place of business at 780 Ridge Lake Blvd., Memphis, TN

38120, d/b/a Union Compress Warehouse of Alabama is a partnership, which partners are Union Service Industries, Inc., described above, and Hillsboro Gin, Inc., which is incorporated in the state of Alabama with a principal place of business at Hillsboro, AL 35643, said addresses being the state of citizenship of each partner, and d/b/a Union Compress Warehouse of Louisiana at Winnsboro, Louisiana, a trade name, and d/b/a Union Compress Warehouse of Louisiana at Ferriday, a partnership, which partners are Union Service Industries, Inc., described above, Anna Gin & Planting Co., Inc., which is incorporated in the state of Mississippi with a principal place of business at Rt. 7, Anna's Bottom Road, Natchez, MS 39120, Clayton Gin, Inc., which is incorporated in the state of Louisiana with a principal place of business at Highway 15, Clayton, LA 71326, Concordia Gin, Inc., which is incorporated in the state of Louisiana with a principal place of business at Highway 15, Ferriday, LA 71334, Frogmore Gin, Inc., which is incorporated in the state of Louisiana with a principal place of business at Frogmore Road, Frogmore, LA 71335, Jonesville Gin, Inc. which is incorporated in the state of Louisiana with a principal place of business at 802 First Street, Jonesville, LA 71343, Gene Miller, an individual, whose domicile and state of citizenship is Louisiana with an address at Highway 562 W., Wisner, LA 71378, and Yarbrough Gin & Elevator Co., Inc., which is incorporated in the state of Louisiana with a principal place of business at Highway 15, Sicily Island, LA 71368 said

addresses being the state of citizenship of each partner; Valley Compress Company, Inc. is incorporated in the state of Texas with a principal place of business at 2201 North. Commerce Street, Harlingen, TX 78551; and West Texas Industries, Inc. is incorporated in the state of Texas with a principal place of business at 2501 Avenue C, Lubbock, TX 79404, (hereinafter referred to as "warehousemen").

2. Bankers Trust Company (hereinafter referred to as "BTCo"), a member of Bankers Trust of New York Corporation, is a New York banking corporation with its principal place of business in New York, New York, doing business in Memphis, Shelby County, Tennessee. Said BTCo can be served with process of this Court by service upon Charles S. Sanford, Jr., whose address is 280 Park Avenue, New York, New York or P.O. Box 318, Church Street Station, New York, New York 10015.

II. JURISDICTION

3. The causes of action hereinafter alleged all arose in Shelby County, Tennessee, and this Court has proper jurisdiction and venue to hear and resolve this controversy in that there is complete diversity of citizenship and damages exceed $50,000.00 exclusive of costs and interest pursuant to 28 U.S.C. § 1332. Defendant is subject to service of process pursuant to Tennessee's long arm statutes, T.C.A. § 20-2-201 et. seq.

III. FACTS

4. Plaintiffs would show that defendant, BTCo, and L&S Cotton Systems, Inc., (hereinafter referred to "L&S"), a Tennessee corporation, were in an agency relationship, each with the other, at all times during the hereinafter described allegations and therefore BTCo is charged with the acts and or omissions of L&S and is liable to plaintiffs as a result of said agency relationship and the allegations hereinafter described. At all times herein L&S was an unwitting pawn being played by BTCo.

COUNT I

5. The plaintiffs rendered certain services and furnished certain supplies to the defendant, on various dates, and said services and supplies were rendered and sold to the defendant by the plaintiffs pursuant to the terms of their negotiable cotton warehouse receipts and their tariffs.

6. Defendant, BTCo, through its agent, L&S, on various dates instructed, pursuant to its letters of transmittal (a sample copy attached hereto as Exhibit "A"), that certain bales of cotton represented by negotiable warehouse receipts attached to the transmittal letter be shipped from the plaintiffs' warehouses, which instructions plaintiffs honored. Defendant BTCo, has failed and refused to pay plaintiffs for services and supplies rendered to and for the benefit of defendant after having been requested to do so. No part of said accounts has been paid. There is now due and owing

by the defendant, BTCo to the plaintiffs, the principal sums as follows:

1.	Bluebonnet Warehousing Corp . .	$164,547.80
2.	Blytheville Compress Co., Inc. .	94,989.96
3.	Central States Cotton Co	213,214.43
4.	D.B. Griffin Warehouse, Inc.	2,567.00
5.	Deer Creek Compress	37,458.82
6.	Delta Coop Compress	64,958.00
7.	Dunavant Enterprises, Inc.	6,968.05
8.	Federal Compress & Warehouse Company, Inc.	206,861.47
9.	Franklin Cotton Warehouse Cooperative	26,814.00
10.	Greenville Compress Co.	30,199.36
11.*	Gulf Compress	122,470.00
12.	Harlingen Compress Co., Inc. . . .	24,459.10
13.	Holmes Gin, Inc.	51,289.91
14.	Levelland Compress Co., Inc. . . .	68,703.40
15.	FST, Inc.	7,226.02

16. National Diversified Co. d/b/a Ballinger Compress Co., Hamlin Compress Co., Rule Compress Co., and San Angelo Cotton Warehouse Co. 21,541.76

17. North Plains Compress, d/b/a North Plains Compress Co. and North Plains Gins, Inc. 49,939.70

18. Pate Grain Co., d/b/a Postex Warehouse Co. 27,156.23

19. Plainview Cooperative Compress, Inc. 50,568.00

20. Port of Corpus Christi Authority of Nueces County Texas Dockside Warehouse and Cotton Compress d/b/a Corpus Christi Public Compress . 24,061.10

21. Rayville Compress & Warehouse Cooperative d/b/a Tallulah Compress & Warehouse and Rayville Compress Warehouse 48,418.40

22. Southern Compress Co. 17,889.30

23. Southern Compress & Warehouse Co. 15,514.00

24. Staple Cotton Cooperative Assn. . 16,271.82

25. Sunflower Compress Co. 40,390.10

26. Sweden Warehouse Co., Inc. 6,390.10

27.	Sweet Jet Oil Co. Trust, Trustee Jack Poe, d/b/a Tri-County Warehouse Company	11,387.83
28.	Sweetwater Compress, Inc.	19,478.97
29.	Tensas Warehouse, Inc.	24,200.50
30.	Texas Compress & Warehouse Corp., d/b/a Stamford Compress & Bonded Warehouse, Seymour Compress & Bonded Warehouse, Colorado Compress & Bonded Warehouse and Haskell Co. Warehouse & Compress Co.	26,262.50
31.	The Trinity Company	109,124.04
32.	Tunica Compress & Warehouse Co.	13,520.81
33.	Union Service Industries, Inc., d/b/a Union Compress Warehouse of Alabama	25,013.10
	Union Compress Warehouse of Louisiana at Winnsboro	11,638.70
	Union Compress Warehouse of Louisiana at Ferriday	254.65
34.	Valley Compress Co., Inc.	9,312.25
35.	West Texas Industries, Inc.	139,015.29
	TOTAL	**$1,830,171.28**

*This amount is subject to a final audit and may be more or less.

Plaintiffs have been damaged by defendant, BTCo in the aggregate sum of $1,830,171.28 together with pre-judgment interest on said amounts at the legal rate from each date of shipment, by virtue of defendant's refusal to pay such charges.

7. Plaintiffs reasonably relied upon the instructions of the transmittal letters executed and delivered to plaintiffs by L&S agent of defendant BTCo, in shipping the cotton described and referred to in said letters in expectation of payment for all accrued charges and services rendered by plaintiffs to and for defendant pursuant to contract, Uniform Commercial Code, custom and practice within the cotton warehousing industry, equitable estoppel, promissory estoppel, and negligent misrepresentations. Defendant is liable for monetary damages sustained by plaintiffs, in the amounts as hereinabove described, for failing and refusing to pay all charges for services rendered and supplies furnished.

8. Alternatively, plaintiffs claim a set off against defendant for mutual debts and/or property owed each to the other.

COUNT II

9. Plaintiffs reallege and incorporate herein, all allegations contained in the previous paragraphs.

10. In 1989, defendant BTCo, entered into a financial arrangement with The Julien Company ("TJC") to lend said

company funds to purchase cotton. Defendant established TJC's total line of credit at approximately $192,000,000.00 in the aggregate. In November, 1989, TJC had been extended credit in the aggregate amount of approximately $350,000,000.00, thus exceeding its initial credit line.

11. Andrew Halle, Mark Yale and other account officers of BTCo, in late 1989 orchestrated a plan to immediately increase and improve BTCo's collateral position in TJC's assets by attempting to obtain cash payments for cotton sales through TJC without advancing any additional funds to TJC's and said officers, acting on behalf of BTCo, committed several acts of fraud in the process of accomplishing this plan as hereinafter described.

12. On April 4, 1988, BTCo and L&S entered into a Cotton Collateral Sub-Depository Agreement describing L&S as an agent of BTCo. L&S was formed as a sub-depository for BTCo to account for all negotiable cotton warehouse receipts delivered to it by TJC. At all times, L&S was subject to BTCo's direct control and authority. One of the duties and responsibilities of L&S was to instruct warehouses in the shipment of cotton. TJC would advise L&S of the cotton to be shipped and the location of the warehouse where cotton was stored. TJC would furnish a tag list and bill of lading for each shipment. Then, L&S would pull the negotiable cotton warehouse receipts listed on the tag list and mail them with an L&S transmittal letter to the designated warehouse with a bill of

lading and tag list. This transmittal letter was approved by officers of BTCo for L&S's use and was further approved as to form and content. The purpose of said letter was to provide instructions to the warehouse for the shipment of cotton.

13. The form and use of said letter was in conformity with the terms of the Cotton Collateral Sub-Depository Agreement entered into between BTCo and L&S and consented to and agreed to by TJC. The use of such transmittal letter between plaintiffs and L&S had become customary, and plaintiffs had received payment for invoiced charges up until shipment of the cotton which is the subject of the claims described herein. The plaintiffs relied upon the instructions of the transmittal letter executed and delivered by L&S, an agent of defendant BTCo, in shipping cotton in expectation of payment for all charges and services rendered during the storage period of said cotton.

14. L&S's transmittal letters were mailed to the plaintiff warehouses, and others, on various dates. BTCo never had any intention of paying for any storage charges or any services rendered by any warehouse at the time said transmittal letters were mailed to and received by said warehouses. This intention was undisclosed to the warehouses at that time. L&S mailed several transmittal letters instructing warehouses to ship cotton in trust for L&S's account on December 5, 6 and 7, 1989, and never advised warehouses to stop shipping cotton pursuant to its

written instructions.

15. As a result of this procedure developed for the shipment of cotton, BTCo attempted to and did improve its collateral position of an under-collateralized loan with TJC, and induced plaintiffs to relinquish their possessory liens on the cotton, by having thousands of bales of cotton shipped from warehouses to mills and other entities for payment to the TJC "lockbox" at BTCo's office in New Jersey for immediate reduction of TJC's credit and yet refused to pay or to advance funds to TJC for payment of all storage and service charges on said cotton although shipment was requested by BTCo's agent L&S. Such acts resulted in accrual of the claims described herein and the accrual of other charges by warehouses similarly situated. BTCo knew or should have known that any entity that presents negotiable bearer cotton warehouse receipts for shipment from a warehouse is legally responsible for all charges and services rendered by said warehouse. In a further attempt to thwart payment, BTCo placed TJC into involuntary bankruptcy on January 10, 1990 and continued to claim that its security interest is superior to the plaintiffs' warehousemen lien in bankruptcy court proceedings and continued to deny that it owed the plaintiff warehouses their accrued charges. All of these actions increased BTCo collateral position in a financial arrangement that had soured.

16. Plaintiffs detrimentally relied upon the transmittal letters in their shipment of stored cotton, by releasing their security for payment of accrued charges, when such security was far in excess of the value of their respective claims.

IV. DAMAGES

17. As a direct and proximate result of the acts and/or omissions of BTCo as described hereinabove, the plaintiffs have sustained financial losses under Counts I and II as set forth in Paragraph 10.

18. All of the actions of the defendant BTCo were done deliberately, wantonly and maliciously with conscious indifference and total disregard for the rights of plaintiffs so as to give rise to an award of $20,000,000.00 as punitive damages against defendant BTCo.

19. Accordingly, the plaintiffs are entitled to recover damages in the amount of $1,830.171.28 together with prejudgment and post judgment interest on said sum at the legal rate, and punitive damages in the amount of $20,000,000.00.

WHEREFORE, PREMISES CONSIDERED, the plaintiffs demand a jury trial and judgment of, from and against the defendant BTCo in the amount of $l,830.171.28 together with prejudgment and post judgment interest on said sum at the contract or legal rate as compensatory damages and $20,000,000.00 punitive costs of this action.

Respectfully submitted,
ALL PLAINTIFFS

BY: Charles J. Swayze, Jr.

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Also appearing on behalf of Dunavant Enterprises, Inc.

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Memphis, TN 38119
(901) 683-3526
Also appearing on behalf of Federal Compress & Warehouse Company, Inc.

CERTIFICATE OF SERVICE

I, Charles J. Swayze, Jr. hereby certify that I have this day mailed by U. S. Mail postage prepaid, a copy of the foregoing Second Amended Complaint to Hon. William J. Landers, Jr. at 22 North Front Street, 11th Floor, Memphis, Tennessee 38103. This the 11th day of September, 1992.

CHARLES J. SWAYZE, JR.

L & S COTTON SYSTEMS
P.O. Box 3281
Memphis, TN 38173-0281

DO 6525
SALE 299-191
S/O L801
WHSE 840508
1966/89

Gentlemen:

We are enclosing for our account bills of lading and/or warehouse receipts together with shipping instructions as listed below in the name of The Julien Company.

The enclosed documents are at all times, to be held and handled by you in trust for our account and when the ladings and/or warehouse receipts are signed they must be returned to
L & S Cotton Systems.

Please receipt us for the above documents and handle in accordance with instructions.

Yours faithfully,

L & S Cotton Systems

No. of Bales	Mark	Designation
83	EAWG	AVONDALE MILLS SYCAMORE, AL
		LOAD 12/15/89

To L & S Cotton Systems
Memphis, TN

Please forward the warehouse receipts or bills of lading, to be handled in trust for your account, to the above mentioned addressee, to be exchanged for bills of lading and/or warehouse receipts.

THE JULIEN COMPANY

By:_____

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

AFFIDAVIT OF WOODS E. EASTLAND IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Exhibits Attached:

	Page No.
A. Copy of Staple's Receipt Form	140
B. Enlarged Copy of Staple's Receipt Form	141
C. 1989/1990 Tariff (Rules, Regulations and Schedule of Charges)	142
D. Copy of Transmittal Letter from L&S with attached shipping instructions, bill of lading, tag list and warehouse receipts	157

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DISTRICT

BLUEBONNET WAREHOUSING CORPORATION, ET AL., *Plaintiffs,*

vs.

NO. 91-2399-TUB

BANKERS TRUST COMPANY, a Member of Bankers Trust of New York Corporation, a Corporation, *Defendant.*

AFFIDAVIT OF WOODS E. EASTLAND
IN SUPPORT OF PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF MISSISSIPPI
COUNTY OF LEFLORE

WOODS E. EASTLAND, President and CEO of Staple Cotton Cooperative Association, d/b/a Staplcotn Compress Warehouse, Plaintiff in this case, makes this Affidavit on behalf of Staple, being authorized to do so and having personal knowledge of the facts set forth:

1. On the date of the commencement of this case, Bankers Trust Company (BTCO) was, and now is, indebted to Staple in the aggregate principal amount of $16,271.82 plus interest and costs of collection for storage charges for bales of cotton shipped on various dates at the request of L&S Cotton Systems, ("L&S").

2. For each bale of cotton stored in Staple, it issued a negotiable warehouse receipt. The form of Staple's receipt is as shown on attached Exhibit "A" and "B". Exhibit "A" is a photocopy of the form and Exhibit "B" is an enlarged copy of the form. Pursuant to the terms of the warehouse receipt the bearer or presenter of the receipt is responsible for all accrued storage charges. The bearer or presenter of the subject receipts was L&S.

3. Attached hereto as Exhibit "C" is a copy of the 1989 tariff (rules, regulations and schedule of charges) issued by Staple pursuant to Federal Regulation and approved by the USDA. It was in effect at all times relating to the cotton and charges at issue. A copy of this tariff was posted according to the regulations of the USDA. Pursuant to the terms of the tariff, Staple holds L&S, the entity that delivered the warehouse receipts to the warehouse, responsible for all accrued charges.

4. Each Staple shipment for which payment of accrued charges is sought was made pursuant to a transmittal letter from L&S together with attached shipping instructions, bill of lading, tag list and warehouse receipts. Each shipment was made pursuant to the instructions specified in the L&S letter. A form copy of this letter is attached as Exhibit "D". Staple received a similar form letter with each of the subject shipment requests and relied upon this letter in shipping the described cotton.

5. Staple originally invoiced The Julien Company ("TJC") for the accrued charges described herein but when TJC failed to pay the accrued charges Staple demanded payment from BTCO, whose agent, L&S, the bearer of each warehouse receipt, presented, delivered, and surrendered the negotiable cotton warehouse receipts for the account of L&S with shipping instructions. This is the customary manner of doing business and invoicing for storage charges by Staple and the warehouse industry.

This the _____ day of May, 1992.

STAPLE COTTON COOPERATIVE ASSOCIATION, D/B/A STAPLCOTN COMPRESS WAREHOUSE

BY: /s/ WOODS E. EASTLAND

SUBSCRIBED AND SWORN TO BEFORE ME, this the 5th day of May, 1992.

/s/ Barbara C. Belk
NOTARY PUBLIC

My Commission Expires:
2/5/94

EXHIBIT

A

LICENSE NUMBER 2-2373

SIAMCOTN COMPRESS WAREHOUSE
GREENWOOD, MISSISSIPPI
STAPLE COTTON COOPERATIVE ASSOCIATION, PROPRIETOR

20108941
RECEIPT AND TAG
No. 108941

LICENSED AND BONDED UNDER THE UNITED STATES WAREHOUSE ACT

ORIGINAL NEGOTIABLE WAREHOUSE RECEIPT FOR ONE BALE OF COTTON

25519 06

CROWE, DWIGHT L.

00191 PP 033107 508 05 503

10 19 87

ISSUED AT GREENWOOD, MISSISSIPPI ON

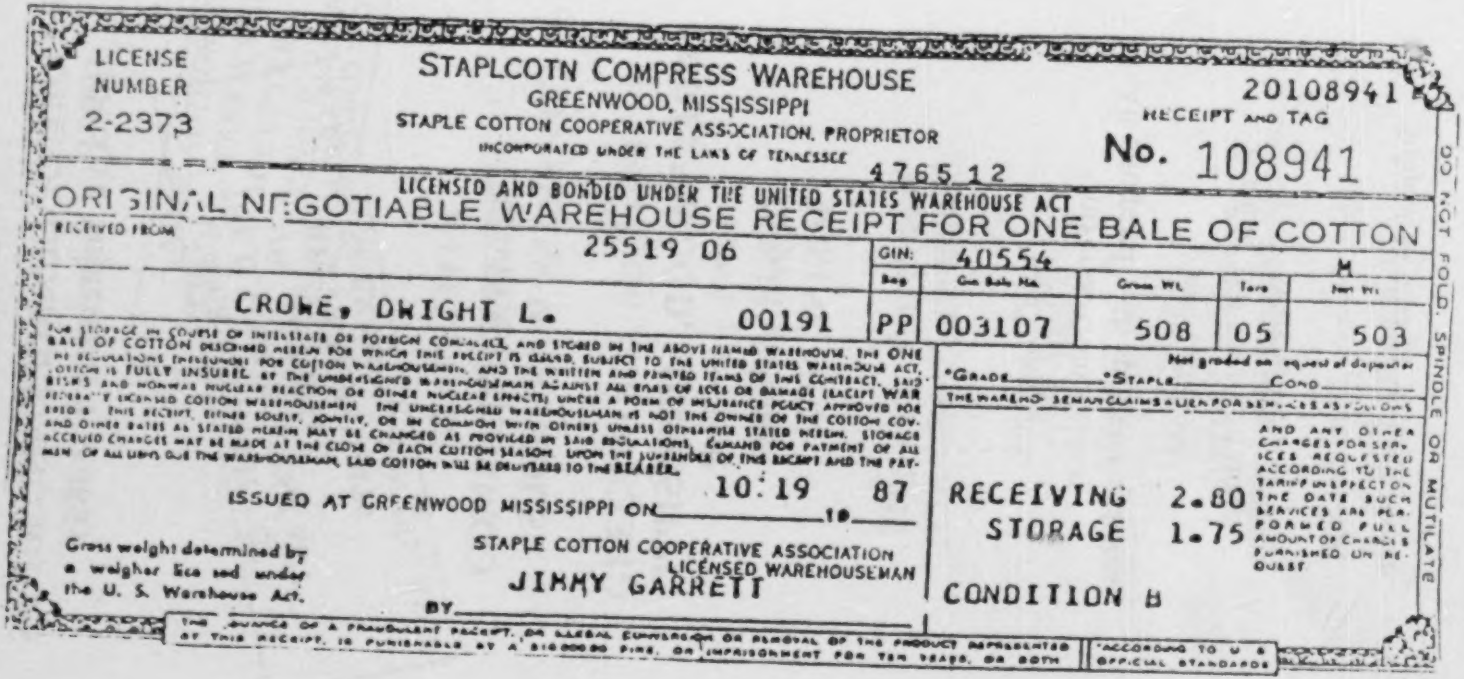
STAPLE COTTON COOPERATIVE ASSOCIATION
LICENSED WAREHOUSEMAN

JIMMY GARRETT

RECEIVING 2-80
STORAGE 1-75

CONDITION B

BEST AVA



LICENSE NUMBER 2-2373

STAPLCOTN COMPRESS WAREHOUSE
GREENWOOD, MISSISSIPPI
STAPLE COTTON COOPERATIVE ASSOCIATION, PROPRIETOR
INCORPORATED UNDER THE LAWS OF TENNESSEE

20108941
RECEIPT AND TAG
No. 108941

476512

LICENSED AND BONDED UNDER THE UNITED STATES WAREHOUSE ACT

ORIGINAL NEGOTIABLE WAREHOUSE RECEIPT FOR ONE BALE OF COTTON

RECEIVED FROM 25519 06

GIN: 40554 M

CROWE, DWIGHT L. 00191

Bag	Gin Bale No.	Gross Wt.	Tare	Net Wt.
PP	003107	508	05	503

FOR STORAGE IN COURSE OF INTERSTATE OR FOREIGN COMMERCE, AND STORED IN THE ABOVE NAMED WAREHOUSE, THE ONE BALE OF COTTON DESCRIBED HEREIN FOR WHICH THIS RECEIPT IS ISSUED, SUBJECT TO THE UNITED STATES WAREHOUSE ACT, AND REGULATIONS THEREUNDER FOR COTTON WAREHOUSEMEN, AND THE WRITTEN AND PRINTED TERMS OF THIS CONTRACT. SAID COTTON IS FULLY INSURED BY THE UNDERSIGNED WAREHOUSEMAN AGAINST ALL RISKS OF LOSS OR DAMAGE (EXCEPT WAR RISKS AND NUCLEAR REACTION OR OTHER NUCLEAR EFFECTS) UNDER A FORM OF INSURANCE POLICY APPROVED FOR FEDERALLY LICENSED COTTON WAREHOUSEMEN. THE UNDERSIGNED WAREHOUSEMAN IS NOT THE OWNER OF THE COTTON COVERED BY THIS RECEIPT, EITHER SOLELY, JOINTLY, OR IN COMMON WITH OTHERS UNLESS OTHERWISE STATED HEREIN. STORAGE AND OTHER RATES AS STATED HEREIN MAY BE CHANGED AS PROVIDED IN SAID REGULATIONS. DEMAND FOR PAYMENT OF ALL ACCRUED CHARGES MAY BE MADE AT THE CLOSE OF EACH COTTON SEASON. UPON THE SURRENDER OF THIS RECEIPT AND THE PAYMENT OF ALL DUES DUE THE WAREHOUSEMAN, SAID COTTON WILL BE DELIVERED TO THE BEARER.

ISSUED AT GREENWOOD MISSISSIPPI ON 10 19 87

Gross weight determined by a weigher licensed under the U. S. Warehouse Act.

STAPLE COTTON COOPERATIVE ASSOCIATION
LICENSED WAREHOUSEMAN
JIMMY GARRETT
BY

Not graded on request of depositor

*GRADE *STAPLE COND

THE WAREHOUSEMAN CLAIMS A LIEN FOR SERVICES AS FOLLOWS

RECEIVING	2.80
STORAGE	1.75

AND ANY OTHER CHARGES FOR SERVICES REQUESTED ACCORDING TO THE TARIFF IN EFFECT ON THE DATE SUCH SERVICES ARE PERFORMED. FULL AMOUNT OF CHARGES FURNISHED ON REQUEST

CONDITION B

THE ISSUANCE OF A FRAUDULENT RECEIPT, OR UNLAWFUL CONVERSION OR REMOVAL OF THE PRODUCT REPRESENTED BY THIS RECEIPT, IS PUNISHABLE BY A $10,000.00 FINE, OR IMPRISONMENT FOR TEN YEARS, OR BOTH

*ACCORDING TO U. S. OFFICIAL STANDARDS

DO NOT FOLD, SPINDLE OR MUTILATE

CAUTION

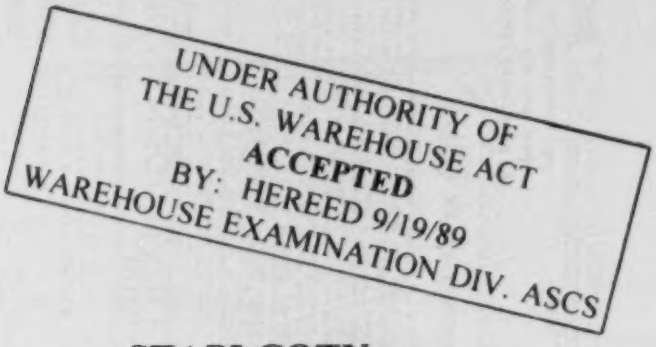
B

141

LABLE COPY

C

SCHEDULE OF CHARGES AND RULES
Effective September 1, 1989



STAPLCOTN
COMPRESS WAREHOUSE

GREENWOOD, MISSISSIPPI

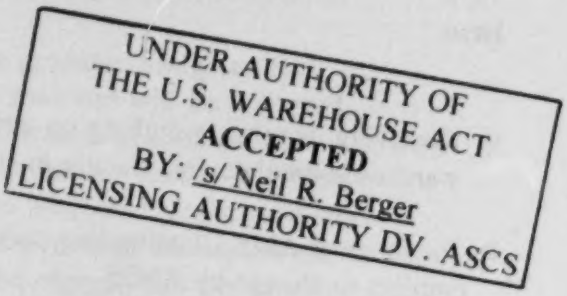
Shipping Point
RISING SUN

Modern Plant
Universal Compression
All equipped with sprinkler systems

Bonded and Licensed under
U.S. Warehouse Act

Subject to change without notice

SCHEDULE OF CHARGES AND RULES
Effective September 1, 1990



STAPLCOTN
COMPRESS WAREHOUSE

GREENWOOD, MISSISSIPPI

Shipping Point
RISING SUN

Staplcotn Warehouse
ITTA BENA, MISSISSIPPI

Shipping Point
ITTA BENA

Modern Plant
Universal Compress on
All equipped with sprinkler Systems

Bonded and Licensed under
U.S. Warehouse Act

SCHEDULE OF CHARGES

Item			
1a	Receiving, tagging, weighing on arrival drawing warehouse receipts and placing in storage		2.00
1b	Payment of AMS Classing Fee (subject to change by AMS)		1.23
2	Each storage month or fractional part thereof, including fire insurance	Per Bale	2.00
3	Weighing or reweighing at time of shipment including furnishing original and three copies of certified weight sheets		1.50
4	Sampling or resampling at time of shipment	Per Bale	3.00
5	Weighing or reweighing and sampling or resampling at time of shipment including furnishing original and three copies of certified weight sheets	Per Bale	4.00
6	Weighing or reweighing, including removing cotton from and returning to storage and furnishing original and three copies of certified weight sheets	Per Bale	4.00
7	Sampling or resampling, including removing cotton from and returning to storage	Per Bale	4.00

7a Replacing samples not originally drawn by this warehouse 4.00

7b Samples for which the producer has given the warehouse delivery instructions will be delivered according to these instructions as soon as practical after sample is drawn. Parties to whom the warehouse has been instructed by the producer to deliver samples, and who wish the warehouse to hold the samples will be charged 500 per sample for holding same.

8 Weighing or reweighing and sampling or resampling, including removing cotton from and returning it to storage and furnishing original and three copies of certified weights. . . . . Per Bale 5.00

9 Drawing an extra set of samples, at time of any sampling . . . . . Per Bale 50¢

10 Furnishing extra copies of certified weight sheets . . . . . Per Bale 15¢

11 Delivery of samples (Postage, express, parcel post, etc.) . . . . . cost

12 Picking out by tag number, removing from storage, delivery to warehouse platform and loading according to custom into car or truck . . . . . Per Bale 8.00

13 Drayage, crosstown by truck . . . . . Per Bale 1.50

14 Cancellation of order and return to stock after breakout . . . . . Per Bale 2.00

15 Extra marking (not more than five letters) . . . . . Per Bale 40¢

16 Typing - 25 pounds, and under, and reweighing . . . . . Per Bale 12.00

17 Typing - over 25 pounds, and reweighing . . . . . Per Bale 20.00

18 Applying shipper tags . . . . . Per Bale 40¢

19 Brushing . . . . . Per Bale 5.00

20 Reconditioning damaged cotton. . . . . Actual cost plus 15%

21 Drying wet cotton . . . . . Per Bale 2.00

22 Arranging for inspection and return to storage if necessary. (This charge not applicable in connection with any other service) . . . . . Per Bale 3.50

23 Handling transit cotton for consolidation or any purpose other than compression (includes in and out handling and loading) . . . . . Per Bale 4.00

24 Furnishing sacks for samples . . . . . Per Sack 1.00

25 Universal Compression (8 bands and no patch) . . . . . Per Bale 8.00

26 Cotton received with banding material that cannot be re-used in compression . . . . . Per Bale 2.00

27 Marrying or divorcing (each bale involved) . . . . . Per Bale 12.00

28 Patches, one marker (Includes cost of applying) . . . . . Each 1.00

29 Extra Bands . . . . . Per Band 20¢

30 Compression of cotton in transit (includes all in and out handling and loading): U.D. (9 bands and no patch) . . . . . Per Bale 12.00

NOTE: Special services not rated herein will be rendered and billed at rates agreed upon at the time of the order.

THE FOLLOWING RULES WILL GOVERN

Rule

1 All accrued charges will be billed to and collected from party surrendering warehouse receipts. All bills are due and payable when service is performed.

2 Alien is claimed upon cotton for all accrued charges and charges advanced by this company.

3 SHIPMENTS

3a For complete shipping orders during the period September 1 - December 31, except when delays are beyond the control of the warehouse, if cotton for immediate shipment is not ready for loading within 21 calendar days after the complete shipping order is received by the warehouse, storage will no longer accrue. Shipping orders received during these dates requesting load date within 21 calendar days of the date the complete shipping order is received will be considered to be for immediate delivery.

3b For complete shipping orders received during the period January 1 - August 31, except when delays are beyond the control of the warehouse, if cotton for immediate shipment is not ready for loading within ten calendar days after the complete shipping order is received by the warehouse, storage will no longer accrue. Shipping orders received during these dates requesting a load date

within ten calendar days of the date the complete shipping order is received will be considered to be for immediate shipment.

The term "complete shipping order" as used herein means a complete set of shipping instructions, which shall include a tag list, original warehouse receipts in numerical order, means of conveyance, desired load date, and any other desired special instructions.

3d Delays beyond the control of the warehouse include, but are not limited to, delays caused by strikes, labor disputes, war or war-like conditions, insurrection, riots, acts of God, fire, flood, or acts of the elements; delays caused by delay in the delivery of acceptable rail cars or the arrival of trucks or containers ordered for loading; and delays caused by bunching of orders.

3e Bunching of orders occurs on any calendar day,

(a) During the period September 1 - December 31, when more than 25,000 bales under complete shipping orders for which the normal ready date is within twenty-one calendar days,

(b) During the period January 1 - August 31, when more than 15,000 bales are under complete shipping orders for which the normal ready date is within ten calendar days,

(c) The term "normal ready date" as used herein means:

(1) for complete shipping orders received September 1 - December 31, requesting immediate shipping or requesting a specific ready date, the later of the requested ready date or 21 calendar days after the date of receipt of the complete shipping order,

(2) for complete shipping orders received January 1 - August 31 requesting immediate shipment or requesting a specific ready date, the later of the requested ready date or ten calendar days after the date of receipt of the completed shipping order.

(d) The warehouse will immediately notify the shipper whose ready date will be delayed because of bunching of orders.

(e) Storage will accrue through the date cotton is loaded except as set out herein.

3f The warehouse will inform the shipper or his agent or his designated representative when the cotton covered by complete shipping orders will be ready for loading. For shipments by truck, if the truck has not signed in by 2:00 P.M. on the second business day after the date the shipper or his agent or his designated representative was

informed the cotton would be ready, the charge in item 14 will be assessed. However, the charge in item 14 will not be assessed if the warehouse did not have the cotton ready to be loaded by the normal delivery date.

4 This company reserves right to compress cotton at any time and to store it in any of its warehouses, and retains a lien on the cotton for compression charges.

5 No services will be performed without written and signed instructions.

6 Shipping lists or service orders must have tag numbers of bales arranged numerically, and made out in duplicate. Shipping lists covering transit cotton and or cotton for carload consolidation must be delivered to this Company before arrival of cotton. This must be a master list, one sheet for each one hundred bales or less, listing first the bales in storage at consolidating warehouse and the following in groups from various origins showing warehouse origin of each group.

7 All bagging originally received on bales will be applied to such IDENTICAL bales when compressed.

8 This Company will not guarantee legible marks to destination unless patched with heavy new bagging, closely woven new burlap or unless marks are applied by this Company.

9 This company is not liable or responsible for any loss or damage due to delay for any reason, interior damage, dampness, damage at time of compression or any other damage resulting from irregular conditions not apparent, or any other cause beyond its control. Our responsibility for missing or inadequate samples will be limited to the replacement of samples of bales still on hand in our warehouses when notice of such missing or inadequate samples is received at our warehouses.

10 Charges for services performed, actual labor costs and other expenses incurred, not specifically mentioned herein, when in direct interest of Owners, shall be charged to party benefitted by same, such services, costs and expenses to be fully described on bills rendered.

11 All cotton received in wet, muddy or damaged condition shall be put in condition immediately and the depositor will be assessed tariff charges for services.

12 When wet or damage cotton is weighed, weigher will exercise his best judgment in making deductions, but this Company does not guarantee such weighing, nor does it guarantee weights on dry cotton due to natural shrinkage.

13 For transferring ownership of record, where no physical operation is involved, there will be no charge. However, new storage will begin on date of transfer and no credit will be allowed storers for unused portion of month's

storage. Original depositor will pay all storage and other charges up to and including date of transfer. New depositors will be charged at current rate.

14 Accrued storage charge may be paid to any desired date but no credit will be allowed for unused portion of month's storage. The new storage month will begin the day following payment date. Any fractional part of a storage month will be counted as a full month. This applies to all cotton whether or not it involves change of ownership between persons, partnerships or corporations including United States, State or City Governmental Departments.

15 This Company will not guarantee DENSITY where size, weight, condition or packages, etc., will not permit, but we will exert all practical efforts to turn out the best package possible.

16 This Company will carry all risk insurance (except war risk, and loss or damage resulting from nuclear reaction or nuclear radiation or radioactive contamination, all whether controlled or uncontrolled; however, direct loss or damage by fire resulting from nuclear reaction or nuclear radiation or radioactive contamination is insured against), against direct loss or damage to baled cotton in course of direct and continuous movement from cotton gins for storage, where ginned and warehoused, ex-

cluding however, coverage of any kind on baled cotton while located on any gin premises, open storage yard, or assembling point used for accumulating carload or truckload shipments, to its warehouses and while stored therein and while legally in custody of this company and until such baled cotton is delivered to mills, warehouses, or public delivery railroad tracks (team tracks) located in the United States and Canada or steamship wharves located in the United States.

Cotton received for compression in transit, consolidation or flow through is covered only while in our custody.

NOTE: Nothing in the foregoing shall be construed as releasing carrier from legal liability under bill of lading obligations. In case of loss or damage resulting from fire, flood, or other causes set out above, the amount of loss or damage shall be the actual cash value of the cotton determined as follows:

"SPECIAL COTTON VALUATION CLAUSE"

It is understood and agreed that adjustment of loss under this Policy for cotton shall be:

(a) the market value of cotton based on the nearest applicable U.S.D.A. Spot Market Quotation but in event no U.S.D.A. Spot Quotations are available on the date of loss, the Quotations of the market upon opening of the

next day following the loss will be used or,

(b) the price as set by the Commodity Credit Corporation as respects producer-owned cotton the producer is entitled to under the provisions of the Commodity Credit Corporation Loan Program prior to the time of the loss, less all discounts and charges to which the merchandise would have been subject had no loss occurred and all to be computed as of the time and place of loss.

17 Acquired or pooled cotton of Commodity Credit Corporation, stored by the Company under a special contract with the Commodity Credit Corporation provides that this Company shall be released from the terms and conditions of this tariff and provisions contained in warehouse receipt relating to insurance at time cotton is pooled or acquired. Also, this company shall be released from the terms and conditions of Commodity Credit Corporation contract upon the sale or transfer of the cotton to any other person, firm or agency, governmental or otherwise. Such cotton upon sale or transfer by the Commodity Credit Corporation will be subject to tariff of this Company in effect at date of sale or transfer. This rule also applies to reconcentrated loan and cotton linters stored under contract with the Commodity Credit Corporation.

18 Five days will be allowed for assembling cotton for compression and/or carload consolidation. If on hand over five days, we will charge tariff rate from date received.

19 Transit not permitted if one or more bales on lading placed in stock.

20 Truckers will be afforded the opportunity to inspect each bale loaded for surface contamination. Trucks in unsuitable condition for cotton loading will not be loaded unless specifically ordered to do so by shipper. Responsibility for bale contamination occurring after bales leave our warehouse must reside with party causing such contamination.

21 NOTE: Due to dimensions of gin compressed bales (either Gin Standard Density or Gin Universal Density) recompression of such bales to Compress Universal Density is dangerous and impractical. This company will, therefore, NOT recompress gin compressed cotton.

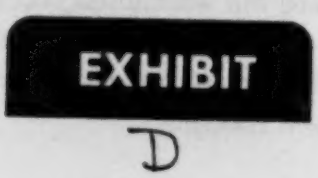
22 This Company will not guarantee condition of bales to destination unless compressed at its facility.

23 This Company will not be responsible for samples not originally drawn at this facility.

We offer excellent consolidation and storage-in-transit privileges for cotton shipped inbound from points on the Illinois Central Railroad.

L & S COTTON SYSTEMS
P.O. Box 3281
Memphis, TN 38173-0281

DO 6525
SALE 299-191
S/O L801
WHSE 840508
1966/89



Gentlemen:

We are enclosing for our account bills of lading and/or warehouse receipts together with shipping instructions as listed below in the name of The Julien Company.

The enclosed documents are at all times, to be held and handled by you in trust for our account and when the ladings and/or warehouse receipts are signed they must be returned to
L & S Cotton Systems.

Please receipt us for the above documents and handle in accordance with instructions.

Yours faithfully,

L & S Cotton Systems

No. of Bales	Mark	Designation
83	EAWG	AVONDALE MILLS SYCAMORE, AL

LOAD 12/15/89

To L & S Cotton Systems
Memphis, TN

Please forward the warehouse receipts or bills of lading, to be handled in trust for your account, to the above mentioned addressee, to be exchanged for bills of lading and/or warehouse receipts.

THE JULIEN COMPANY

By:_____

(2)

No. 96-867

Supreme Court, U.S.
FILED
DEC 30 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

BLYTHEVILLE COMPRESS CO., INC., *et al.*,

Petitioners,

vs.

BANKERS TRUST COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT E. ORIANS
Counsel of Record
LEE L. PIOVARCY
SCOTT T. BEALL
MARTIN, TATE, MORROW
& MARSTON, P.C.
Attorneys for Respondent
11th Floor, The Falls Building
22 North Front Street
Memphis, Tennessee 38103-1182
(901) 522-9000

70250 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, Inc.

17 pp

STATEMENT PURSUANT TO RULE 29.6

Bankers Trust Company is a wholly owned subsidiary of Bankers Trust New York Corporation. The following are Bankers Trust Company's nonwholly owned subsidiaries: Bankers Trust Caribe Capital Markets, Inc.; BT Asia Investment Co., Ltd.; Inversiones BT Foods Ltd.; Amertrust Limited; The World Markets Company GmbH; Thai Investment Securities Public Company Limited; Wan Fu Trading & Consulting Co., Ltd.; Chuan Shin Investment Co. Ltd.; Berz-One, LLC; BT Distribuidora de Titulos e Valores Ltd.; IBKFV Investment Partnership; and Bukor Beteiligungs-und Beratungsgesellschaft mbH & Co. KG.

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Cases Cited:

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Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 1, 11

Federal Deposit Ins. Corp. v. Quality Inns, Inc., 735 F. Supp. 1311 (D. Md. 1990), *aff'd*, 928 F.2d 399 (4th Cir. 1991) 10

Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 8

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States Marine Int'l, Inc. v. Seattle-First National Bank, 524 F.2d 245 (9th Cir. 1975) 10

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7 C.F.R. § 735.29 ..... 5, 8, 9

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INTRODUCTION

Respondent, Bankers Trust Company ("Bankers Trust"), respectfully opposes the Petition For Writ Of Certiorari. The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 89 F.3d 292 (6th Cir. 1996) and is reprinted in Petitioners' Appendix at pages 77-108. The decision of the United States District Court for the Western District of Tennessee is reprinted in Petitioners' Appendix at pages 35-74.

THE PETITION FAILS TO MEET THE REQUIREMENTS OF SUPREME COURT RULE 10 AND SHOULD BE DENIED.

Supreme Court Rule 10 states that "[a] petition for writ of certiorari will be granted only for compelling reasons." The text of the rule sets forth specific reasons that may satisfy this standard, which include decisions by state or federal courts concerning important questions of federal law or conflicts between decisions of various circuit courts of appeal.

First, this action involves the application of state law (primarily the Uniform Commercial Code and state common law) to a dispute between unsecured creditors and a secured creditor of a now-bankrupt mutual debtor. Second, there are no genuine federal law questions in this diversity case. Third, the decision of the court of appeals in this case is not in conflict with any decision of another United States court of appeal. Finally, the parties submitted this case to the district court on cross-motions for summary judgment. The district court properly reviewed and evaluated the record, which includes (i) submissions of undisputed facts by each of the parties and (ii) expert affidavits filed by Respondent. Summary judgment was properly awarded in accordance with *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Petitioners have had a fair and adequate

consideration of the issues in the courts below. This case history presents no compelling reason for review by this Court.

The Petition does not demonstrate that any of the criteria of Rule 10 are met given the facts and issues of this case. Accordingly, Respondent respectfully submits that the Petition should be denied.

COUNTERSTATEMENT OF THE CASE

The issues in this case are governed by the Uniform Commercial Code ("UCC") and state common law — **not** by the United States Warehouse Act (the "Warehouse Act"). The dispute involves claims by unsecured creditors (the "Warehouses") against a secured creditor (Bankers Trust) of a mutual debtor ("The Julien Company" or "TJC"). To avoid the results dictated by the UCC and state common law, the Warehouses seek to create a contract between themselves and Bankers Trust for the payment of services rendered by the Warehouses to and for benefit of TJC.

The Julien Company was formerly one of the largest cotton merchandising companies in the world. During the course of its business, TJC acquired ownership of thousands of bales of cotton stored in warehouses by purchasing negotiable warehouse receipts. Bankers Trust, along with several other lenders, financed TJC's cotton merchandising business. Bankers Trust and the other lenders required TJC to pledge its warehouse receipts as collateral for this financing. In order to perfect their security interests in TJC's warehouse receipts, Bankers Trust and the other lenders required TJC to deliver physical possession of the warehouse receipts to L&S Cotton Systems, Inc. ("L&S"), collateral sub-custodian for Bankers Trust and the other lenders.

Each Warehouse in this case stored TJC's cotton. Each

Warehouse released and shipped TJC's cotton, upon TJC's request and direction, without first being paid by TJC for accrued storage charges despite having the legal right to refuse to ship the cotton until their storage charges were paid. The Warehouses knowingly waived their statutory lien rights by releasing the cotton and invoiced TJC for their charges. TJC never paid the charges and was later forced into bankruptcy.

After being unsuccessful in collecting the charges from TJC or the TJC bankruptcy estate, the Warehouses initiated this action in the district court claiming that Bankers Trust owed the storage charges as a party to an express or implied contract with each of the Warehouses. Following discovery, the Warehouses and Bankers Trust each submitted statements of undisputed facts, exhibits, affidavits, and deposition transcripts to the district court and filed cross-motions for summary judgment. United States District Judge Jerome Turner found that there were no material facts in dispute and granted Bankers Trust's motion for summary judgment dismissing the entire case.

In pertinent part, Judge Turner ruled that (i) under federal or state law, no contract — express or implied — existed between the Warehouses and Bankers Trust obligating Bankers Trust to pay TJC's debts, (ii) Bankers Trust's use of a standard bank transmittal letter to forward negotiable warehouse receipts to the Warehouses was commercially reasonable and necessary under the UCC to protect Bankers Trust's security interest in the negotiable warehouse receipts, and (iii) pursuant to UCC §§ 9-304(2), 9-305 and 9-317, and established case law, Bankers Trust's use of a bank transmittal letter did not obligate Bankers Trust to pay TJC's cotton storage charges.

The court of appeals affirmed the district court's judgment and agreed that a secured lender holding negotiable documents of title merely to protect its security interest in accordance with

the requirements of Article 9 of the UCC does not become contractually liable for its borrower's debts. The court of appeals denied the Petitioners' request for a rehearing and their suggestion for a rehearing *en banc*.

CORRECTION OF MISSTATEMENTS OF FACT OR LAW IN THE PETITION

Pursuant to Supreme Court Rule 15.2, the following are misstatements of fact or law in the Petition:

(a) At page 2, Petitioners wrongly claim they provided warehousing services for Bankers Trust. Both the district court and the court of appeals specifically determined that Petitioners provided warehousing services for **TJC** — not Bankers Trust.

(b) At page 3, Petitioners' mischaracterize the language contained in the Petitioners' schedule of charges and rules. None of the Petitioners' schedule of charges and rules discuss 'liability' for warehouse charges. Furthermore, Petitioners fail to mention that at least two (2) Petitioners' schedule of charges and rules do not designate any party from whom the warehouse will seek payment for warehouse charges.

(c) Contrary to Petitioners' statement at page 4, federal question jurisdiction concerning the interpretation and enforcement of the United States Warehouse Act, 7 U.S.C. § 241 *et seq.*, was **never** asserted or claimed in the Petitioners' complaint filed in this action. The sole basis for jurisdiction alleged in Petitioners' complaint was diversity of citizenship pursuant to 28 U.S.C. § 1332.

(d) At page 4, Petitioners for the first time incorrectly assert that this Court "has consistently decided in its judicial opinions that a filed and published [warehouse] tariff such as those filed in this case has the enforceability of law." Petitioners fail to cite even one prior decision of this Court (or any other court) to support this unwarranted assertion.

(e) Beginning at page 5, Petitioners distort U.S.D.A. regulation, 7 C.F.R. § 735.29. By the 'artful' use of ellipses and the intentional omission of critical language from the quoted regulation, Petitioners seek to obfuscate that the Warehouse Act regulations *only* apply to warehouses licensed or seeking to be licensed under the Warehouse Act. The following is a *complete*, unedited quote of the first two sentences of 7 C.F.R. § 735.29, with the portions omitted by Petitioners italicized:

> *A licensed warehouseman shall not make any unreasonable, exorbitant, or discriminatory charge for services rendered. Before a license to conduct a warehouse is granted under the act,* the warehousemen shall file with the Department a copy of his rules, if any, and a schedule of the charges to be made by him *if licensed.*

The omitted language clearly shows that this particular regulation only applies to federally-licensed warehouses. As noted herein at footnote 2, page 9, thirteen (13) of the twenty-eight (28) Petitioners are **not** federally-licensed.

Further, as discussed herein at footnote 1, page 8, Petitioners omit a critical section of this regulation

dealing specifically with warehouse charges and the regulation's directive that even federally-licensed warehouses should look to state laws for collecting unpaid warehouse charges. Thus, a reading of the entire regulation shows that it seeks to prohibit federally-licensed warehouses from engaging in harmful pricing practices; it is not intended to arm warehouses with extraordinary collection powers. This is the first time the Warehouses have asserted that collection of charges by *both* federally-licensed and state-licensed warehouses are solely governed by the U.S.D.A. regulations to the exclusion of the UCC and other state law.

(f) Petitioners' assertion at page 7 that the Interstate Commerce Act is controlling — an assertion raised for the first time in the Petition for Rehearing and Suggestion for Rehearing En Banc and the primary basis of this Petition — is a gross misstatement of the law.

(g) At page 10, Petitioners seek to distort the meaning of the term "shipper" in their schedules of charges and rules. Petitioners erroneously suggest that the term "shipper" means the person who "shipped *the warehouse receipts*" to the warehouse. Petitioners then use this distortion to imply that Bankers Trust was the "shipper" under their schedule of charges and rules because its agent, L&S, forwarded the warehouse receipts to the Warehouses with TJC's shipping instructions. Notably, Petitioners fail to disclose that the district court *specifically* found that the undisputed facts establish that TJC was the shipper of the released cotton — not Bankers Trust or its agent, L&S.

(h) At pages 16-19, Petitioners assert that Bankers Trust had actual or constructive notice of the terms of Petitioners' schedules of charges and rules. Neither court below so found; nor does the record support this assertion. Further, Petitioners fail to cite any authority for the proposition that the filing by a warehouse of its schedule of charges and rules with the U.S.D.A. provides constructive notice of the warehouse's charges and rules to a cotton merchant's lender.

(i) Petitioners' argument at pages 18-19 as to what "is clearly understood within the cotton industry" asserts facts not in the record and must be ignored.

(j) Petitioners' argument at page 22 that Bankers Trust recovered "100% of the value of the cotton stored by petitioners" and that "[a]ll funds derived from the sale of the subject cotton to the mills were deposited in Bankers Trust accounts" asserts facts not in the record and must be ignored.

In paragraphs (c), (d), (e), and (f) above, Respondent calls attention to a series of issues that should not be considered by this Court because they were not properly raised and preserved in the lower courts.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS' CLAIMS DO NOT WARRANT REVIEW BY THE UNITED STATES SUPREME COURT.

A. There Is No Federal Question.

The mere fact that fifteen (15) of the twenty-eight (28) Petitioners are federally-licensed warehouses does not elevate this dispute to a federal question. Warehouses are not required to be licensed under the Warehouse Act and only those which choose to be licensed become subject to regulation thereunder. However, a warehouse that elects to be licensed under the Warehouse Act remains subject to the non-conflicting regulations of the state in which it operates. Because of the dual federal/state systems of regulation of warehouses, the Warehouse Act preempts state law only on those matters regulated by the Warehouse Act. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 237 (1947). In those areas not expressly regulated by the Warehouse Act, state law controls. *Id.*[1]

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1. It is important to note that the regulations promulgated under the Warehouse Act specifically direct a federally-licensed warehouse to state law for collecting unpaid warehouse charges. In pertinent part, 7 C.F.R. § 735.29 provides as follows:

> A licensed warehouseman may demand payment of all accrued charges at the close of each cotton season. If, upon demand, the owner of the cotton refuses to pay such charges at the end of a season, **the warehouseman may take such action to enforce collection of his charges as is permitted by the laws of the State in which the warehouse is located.**

(Cont'd)

Both the district court and the court of appeals properly interpreted the Warehouse Act and applicable state law and held that a secured party acting in a commercially reasonable manner to protect its security interest is not liable for its borrower's debts. As the Warehouse Act does not address or regulate commercial law creditor issues, neither court found a conflict between the Warehouse Act and the UCC. Accordingly, the lower courts correctly applied provisions of the UCC and other state law in rendering their decisions.[2]

B. The Interstate Commerce Act Is Not Relevant.

Instead of addressing the Warehouse Act and regulations promulgated thereunder, Petitioners seek to misdirect the Court's attention to the Interstate Commerce Act ("ICA") and case law interpreting its regulations. Petitioners focus solely on the rules and regulations created by the Interstate Commerce Commission ("ICC") and case law interpreting those ICC regulations with the hope that this Court will somehow transform the ICC regulations into regulations promulgated under the Warehouse Act. Indeed, Petitioners fail to cite any rule or regulation issued pursuant to the Warehouse Act or any case law interpreting the Warehouse Act which contradicts the opinions below.[3]

(Cont'd)

Id. (emphasis added). Inexplicably, in citing and quoting this U.S.D.A. regulation at page 5 of the Petition, Petitioners omitted this key provision which sets forth the law governing a warehouse's collection of its charges.

2. Thirteen of the Petitioners are not federally-licensed, and the Warehouse Act and the regulations promulgated thereunder do not apply to these particular Petitioners. No issues have been raised nor has any argument been advanced that the lower courts misinterpreted state law with respect to these thirteen Petitioners.

3. In the opening sentence of their argument on page 4, Petitioners

(Cont'd)

There is no rational basis, legal precedent or constitutional authority for this Court to apply the statutory and regulatory interpretations of the ICA to the completely dissimilar Warehouse Act. The ICA and case law interpreting former ICC rules and regulations are irrelevant to this case. The ICA is a complex and detailed statutory scheme for the regulation of interstate common carriers and shippers. The plethora of case law involving ICC rate disputes indicates that the ICC closely regulated all aspects of the transactions between common carriers and shippers, including the collection of unpaid charges. None of the parties to this case are common carriers or shippers and the rules and regulations governing the transportation of goods in interstate commerce are not applicable to this case.

C. The United States Courts Of Appeal Are Not In Conflict.

The lower courts, applying well-settled UCC and state common law principles, held that Bankers Trust was not liable for its borrower's debts. There is no split among the United States courts of appeal with respect to claims made by unsecured creditors against secured creditors with facts similar to the case at hand. *See SMP Sales Management, Inc. v. Fleet Credit Corp.*, 960 F.2d 557 (5th Cir. 1992); *A/S Dampskibsselskabet Torm v. Beaumont Oil, Ltd.*, 927 F.2d 713 (2d Cir.), *cert. denied*, 502 U.S. 862 (1991); *Federal Deposit Ins. Corp. v. Quality Inns, Inc.*, 735 F. Supp. 1311 (D. Md. 1990), *aff'd*, 928 F.2d 399 (4th Cir. 1991); *States Marine Int'l, Inc. v. Seattle-First National Bank*, 524 F.2d 245 (9th Cir. 1975).

(Cont'd)

boldly assert that this Court "has consistently decided" that a filed and published warehouse tariff has the enforceability of law. Yet, Petitioners fail to cite even one prior decision of this Court to support this unwarranted assertion. This misleading and inaccurate assertion is illustrative of the numerous examples of the Petition's bold but baseless assertions.

II.

THE COURT OF APPEALS PROPERLY AFFIRMED BANKERS TRUST'S SUMMARY JUDGMENT WHERE THERE WAS NO GENUINE ISSUE OF MATERIAL FACT.

The parties submitted this case to the district court on cross-motions for summary judgment with statements of undisputed facts submitted by each of the parties. The district court concluded that the material facts in this case were not in dispute. Moreover, the district court found that the Petitioners failed to come forward with evidence which would require their claims to be submitted to a jury. Accordingly, the district court properly granted summary judgment to Bankers Trust, which judgment was affirmed by the court of appeals. As a matter of law, "summary judgment is appropriate when, after being given a reasonable opportunity to substantiate its claims, the nonmoving party is unable to establish any essential element of its case on which it will have the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 321 (1986).

In this case, the lower courts have not deviated from the accepted and usual course of judicial proceedings by awarding summary judgment to Bankers Trust. The lower courts properly stated and applied accepted rules of law to dismiss the Petitioners' claims. Petitioners simply refuse to accept the lower courts' factual findings in this case. Petitioners' unwillingness to accept such findings is hardly a compelling reason for this Court to grant Petitioners' writ for certiorari.

CONCLUSION

The Petition does not present any questions that warrant review by this Court, and there are no compelling reasons for this Court to issue a writ of certiorari. Accordingly, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. _____

In The
Supreme Court of The United States
October Term 1996

BLYTHEVILLE COMPRESS CO., INC., et al.,
Petitioners,

v.

BANKERS TRUST COMPANY,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Sixth Circuit

PETITIONERS' REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

BLYTHEVILLE COMPRESS CO., INC., ET AL.,
Petitioners,

v.

BANKERS TRUST COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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THE PETITION MEETS THE REQUIREMENTS OF SUPREME COURT RULE 10

It is obvious from respondent's opposition brief that there is need for review by this Court to interpret the terms of the United States Warehouse Act and the enforcement of tariffs through which cotton warehouses operate promulgated under that Act.

At the very core of this dispute lies the authority given the Secretary of Agriculture under the United States Warehouse Act in approving the language and rules and regulations of warehouses through the promulgation of their tariffs. The decisions of the District Court and the United States Court of Appeals are in direct conflict with the decisions by the United States Supreme Court in its interpretation and enforcement of tariffs issued pursuant to the Interstate Commerce Act, an act analogous to the United States Warehouse Act. The District Court and Court of Appeals have ignored the importance of the cotton warehouses' tariffs and the rules set forth therein, particularly rules setting forth who is responsible for warehouse charges. The warehouse tariff is the only effective method of

contracting between parties in the warehousing industry.

RESPONSE TO COUNTERSTATEMENT OF THE CASE

This case is governed by the United States Warehouse Act and the rules and regulations issued thereunder by the Secretary of Agriculture. Bankers Trust has mislead this Court in its many assertions of "fact". Both the District Court and the Court of Appeals have determined that the owner of the subject warehouse receipts and underlying cotton was Bankers Trust. Therefore, Bankers Trust's repeated statements that the warehouses stored The Julien Company's cotton and shipped The Julien Company's cotton are clearly erroneous. Bankers Trust also ignores the fact that the warehouse receipts were surrendered by L & S Cotton Systems, an agent of Bankers Trust Company, under cover of L & S's transmittal letter, the terms of which are set forth in the dissenting opinion of Chief Judge Merritt: "Each time it (Bankers Trust) wrote a letter to the warehouse giving the shipping instruction and saying that 'the documents [warehouse receipts showing ownership in the Bank, bills of lading, and shipping instructions] were at all times to be

held and handled by you in trust for our account.' The Bank, as owner, had complete control over the warehouse receipts and hence complete control of the cotton. The Bank, as owner of the cotton, directly and knowingly requested by letter and used the services of the warehouses." Appendix at p. 28. Also, see copy of transmittal letter at page 42 of the Appendix.

The District Court and Court of Appeals have simply failed or neglected to enforce the terms of the tariffs. Their rulings have been in total disregard of all United States Supreme Court decisions and Courts of Appeal's decisions enforcing tariffs of a similar nature promulgated under the Interstate Commerce Act, an act similar to the United States Warehouse Act. It is essential to the warehousing industry that their rights and rules and regulations set forth under their tariffs be enforced just as tariffs are enforced under the Interstate Commerce Act and other Federal Acts.

RESPONSE TO RESPONDENT'S CORRECTION OF MISSTATEMENTS OF FACT OR LAW IN THE PETITION

Responding item by item to the respondent's statement of petitioners' facts in paragraphs (a) through (j), petitioners would show:

(a) It is undisputed that the petitioner warehouses provided warehousing services for Bankers Trust. As set forth in Chief Judge Merritt's dissent at page 27 of the Appendix: "The facts in the appellate record suggest that: The warehouses, in lawful possession of the cotton, acted to store and preserve the cotton for the benefit of the Bank as owner of the cotton without the express consent of the Bank. The benefit was not forced on the Bank against its will. When the Bank ceased taking warehouse receipts and funding The Julien Company, and then placed it into involuntary bankruptcy, it was well aware that the warehouse charges were unpaid and that it had accepted the benefit of their storage services."

(b) Most of petitioners' tariffs provide that: "All accrued charges will be billed to and collected from the

parties surrendering the warehouse receipts." Appendix at p. 51-52, Note 11. Furthermore, the 6th Circuit opinion at page 7 of the Appendix refers to "liability" when it states: "Many of the tariffs, in turn, state that whoever surrenders the receipts will be liable for the storage charges."

(c) The basis for jurisdiction alleged in petitioners' Third Amended Complaint was diversity of citizenship pursuant to 28 U.S.C. § 1332. However, at page 4 of petitioners' Petition it is simply stated that "a federal question existed concerning the interpretation and enforcement of the United States Warehouse Act, 7 U.S.C.A. § 241 et seq." This statement is true.

(d) Respondent has misquoted petitioners at page 5, paragraph d. by adding in brackets the word "warehouse", and by adding the word "filed" after "such as those". The word "warehouse" was not intended or understood to be describing the type of tariff referred to in that sentence. The sentence, at page 4 of petitioners' Petition, correctly states petitioners' position that the United States Supreme Court "has consistently decided in its judicial

opinions that a filed and published tariff such as those in this case has the enforceability of law." It is clear even from a cursory review of petitioners' Petition that petitioners are analogizing tariffs promulgated under the Interstate Commerce Act to those tariffs promulgated under the United States Warehouse Act.

(e) As noted in respondent's brief, 15 of the 28 petitioners are federally licensed warehouses and clearly subject to the terms of the United States Warehouse Act. The other 13 petitioners' tariffs were approved by the United States Department of Agriculture. Those tariffs of non-federally licensed warehouses with language similar to those in the federally licensed warehouse tariffs should be given the same enforceability of law.

(f) At no point in the Petition do petitioners assert that the Interstate Commerce Act itself is controlling. What is stated is that "the United States Warehouse Act has not garnered significant judicial attention; but, the rates, rules and regulations, which are components of the Interstate Commerce Act, have been interpreted extensively.

These cases are instructive to the case at bar and controlling." Petition for Writ of Certiorari at p. 7.

(g) Both the District Court and the Court of Appeals have determined that Bankers Trust was the party that surrendered the subject warehouse receipts. It is petitioners' position that those courts improperly found as a fact that Bankers Trust was not the shipper within the meaning of some tariffs. This ambiguity would be for a finder of fact and not for a court to determine on summary judgment.

(h) The United States Supreme Court's decisions relating to the Interstate Commerce Act constitute authority that the proper promulgation and posting of a tariff under a Federal Act results in constructive notice of the terms of the charges and rules contained therein.

(i) Petitioners stand by their position that it is clearly understood within the cotton industry that a negotiable cotton warehouse receipt will change hands many times in the course of a cotton season and that the identity of each subsequent holder is obviously unknown to the warehouse until it is

surrendered for the bale of cotton. This Court, or for that matter any court, can take judicial knowledge of this fact, a fact which has never been disputed in the case sub judice. The Sixth Circuit opinion at page 12 of the Appendix makes reference to "a subsequent holder of the warehouse receipt." The District Court found petitioners' assertion as factual. In its opinion at page 39 of the Appendix, its states: "In this way, simply by transfer of the negotiable warehouse receipt, the cotton may be sold several times without the bale itself ever moving from its original storage location."

(j) Petitioners' statement that Bankers Trust recovered 100% of the value of the cotton stored by petitioners is argument based on fact. However, this statement is substantiated by the dissenting opinion of Chief Judge Merritt at page 28 of the Appendix when he states: "Thereafter, the Bank accepted the proceeds of the sale of the cotton which the warehouses had preserved." The fact remains that Bankers Trust benefitted from the services of the warehouses and became unjustly enriched by not being required to pay for those services.

REASONS FOR GRANTING THE WRIT

I. Petitioners' Claims Warrant Review.

A. There is a federal question.

B. Decisions Relating to the Interstate Commerce Act are Relevant.

The primary issue before this Court is whether or not a tariff issued pursuant to the United States Warehouse Act and the rules and regulations promulgated thereunder has the same enforceability of law as does a tariff issued under the Interstate Commerce Act.

C. The Federal Decisions are in Conflict

As set forth in petitioners' Petition, all United States Courts of Appeal, as well as the United States Supreme Court, have ruled in favor of the enforceability of tariffs issued pursuant to the Interstate Commerce Act. The District Court and Sixth Circuit's opinions in the case sub judice are in conflict with all of the cited authorities which enforce the terms of the tariffs issued under the Interstate Commerce Act.

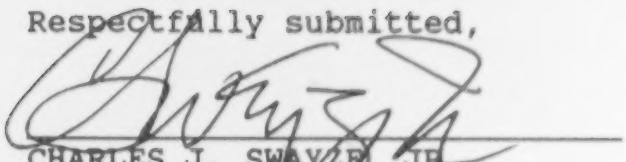
II. Summary Judgment by the District Court and its Affirmance by the Sixth Circuit Court of Appeals are Erroneous

This Court should review these decisions and grant certiorari so as to put new life into the warehouse tariffs, thereby allowing warehouses to contract with holders of the negotiable warehouse receipts who also are the owners of the underlying cotton. To not correct the situation as presently existing under the terms of the Sixth Circuit opinion will be devastating to the cotton warehouse industry in that there will be no means by which they can contract with parties storing cotton with them. There is thus a compelling reason for this Court to grant petitioners' Petition for Writ of Certiorari.

CONCLUSION

The Petition presents serious questions concerning the enforceability of a tariff promulgated and issued pursuant to the United States Warehouse Act and warrants review by this Court. Accordingly, this Court should grant petitioners' Petition for Writ of Certiorari.

Respectfully submitted,



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